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IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

Appeal from the United States District Court for the District of Columbia

JOINT APPENDIX
Volume III

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

AFFIDAVITS IN SUPPORT OF TIME WARNER ENTERTAINMENT COMPANY, L.P.'S MOTION FOR SUMMARY JUDGMENT

* * * *

May 25, 1995

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

AFFIDAVIT OF E. THAYER BIGELOW

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

E. THAYER BIGELOW, being duly sworn, deposes and states as follows:

1. I am President and Chief Executive Officer of Time Warner Cable Programming ("TWCP"), a division of Time Warner Cable ("TWC"), which itself is an unincorporated division of Time Warner Entertainment Company, L.P. ("TWE"). I have previously submitted an affidavit for this case, dated February 12, 1993, and I incorporate the contents of that affidavit by reference herein.

2. TWC has still not invested in any new conventional cable programming services since the passage of the 1992 Cable Act because it lacks confidence in the ability of any new programming service to obtain distribution under the 1992 Cable Act's regulatory scheme. At least 50-60 programmers have approached TWC to ask for investment in new programming. TWC has refused all of them. Some examples of potential programmers include the Career and Opportunity Network, the Scholastic Network, C-Net, the American Health Network and Ovation. Although we believed that these and other program services would have been well received by subscribers and had great potential to expand the variety and depth of speech offered on cable television, the effect

of the Cable Act convinced us that these vendors would not be sound investments.

3. All cable systems are channel constrained. Only a handful of services such as ESPN, USA Network, CNN and MTV have fully penetrated the cable universe. Beyond those are several services with significant coverage that are hoping to reach more subscribers. An even larger number of program services have reached fewer than 30 million subscribers and are trying to obtain more significant distribution. This group includes services such as E! Entertainment TV, Court TV and the Cartoon Network. New ideas must compete not only against each other but also against the established services for scarce channel space. This makes investment in programming services an extremely high risk. Even with substantial investment in a promising idea, prospects of carriage are grim.

* * * *

5. Although a number of cable systems have plans to upgrade and rebuild, channel capacity will always be scarce. Significant rebuilds will take time to accomplish and even when they are complete, there will still be capacity constraints limiting programming options. In my experience, the development of cable programming networks has always outpaced channel expansion. Back when 20 channels seemed like a lot of space people wondered how it could all possibly be used. Filling channels has never been a problem. Currently, a system with 77 analog channels has well over 100 cable networks (let alone pay-per-view, premium services, locally originated and distant broadcast stations) competing for whatever space is available after must-carry, leased access and PEG requirements are fulfilled.

6. A great deal of channel space which cable programming could compete for in a free market is occupied by must-carry and retransmission consent stations. An estimated 30,025 are occupied by must-carry stations. Another 44,725 channels are vulnerable to must-carry de-

mands.[1] The Cable Act has thus effectively removed nearly 75,000 channels from the scarce channel space for which cable programmers may compete. This space is eliminated from the pool of available channels regardless of capacity expansion, and could readily support 30-40 new cable program services.

* * * *

May 25, 1996

/s/ E. Thayer Bigelow
E. THAYER BIGELOW

[Jurat Omitted]

[1] *Arthur D. Little Report to NCTA*, April, 1995.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

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* * * *

AFFIDAVITS IN SUPPORT OF TIME WARNER ENTERTAINMENT COMPANY, L.P.'S MOTION FOR SUMMARY JUDGMENT

* * * *

May 26, 1995

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

[Caption Omitted]

AFFIDAVIT OF BRENDAN CLOUSTON

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

I, Brendan Clouston, on behalf of Tele-Communications, Inc. ("TCI"), state the following based on my personal knowledge:

1. I am President of TCI Communications, Inc., a wholly-owned subsidiary of TCI that operates its cable systems, as well as its satellite-delivered programming operations.

2. TCI currently has approximately 11.5 million customers to the cable systems that it owns and operates, although that number fluctuates greatly.

3. In addition to its cable and satellite delivery system operations, TCI operates or holds an interest in a number of video programming services.

4. TCI's cable systems have very little unused channel capacity. Although TCI intends to use digital compression technology to increase the number of programming options offered to subscribers, its early expectations regarding the timing for delivery of that technology have proven to be overly optimistic. Implementation of the technology for any significant number of subscribers will be phased in over a period of time, for several reasons.

First, television set top digital compression converters, which are required for a subscriber to enjoy the

benefits of compression, will cost hundreds of dollars per household. Obviously, some critical mass of subscribers must be willing to bear at least some portion of this cost.

Second, because TCI currently does not have blocks of unused channels for a significant number of subscribers, digital compression will require TCI to drop programming from existing channels in order to provide the channels needed for compression. Although this will benefit subscribers that have acquired the digital compression converters, it also will result in the loss of those channels for a majority of subscribers who would not be directly utilizing the compression services.

Third, although TCI believes that technology has advanced to the point at which compression is possible, the necessary technology has yet to be delivered. In addition, companies that manufacture converter boxes have not yet proven their ability to produce the boxes, let alone to meet the production requirements for a significant roll-out. Finally, the perceived impact and actual result of cable rate regulation, as set forth in the 1992 Cable Act, has impeded TCI's ability to raise capital. This, in turn, has slowed increases in channel capacity. In short, TCI anticipates that constraints on channel capacity will continue to affect programming carriage decisions even after the implementation of digital compression technology has begun.

5. Although TCI currently is rebuilding most cable systems using fiber, those rebuilds as currently being constructed will not increase channel capacity in all cases. At this time, the fiber is being constructed from the cable system headend to the neighborhood, but the coaxial cable that runs to the home is not being upgraded. Consequently, these fiber rebuilds will improve picture quality and reliability but, standing alone, will not increase channel capacity.

6. The "must carry" provisions of the 1992 Cable Act, together with the implementing regulations, have injured

TCI in a number of significant ways. First, because unused channel capacity is scarce, "must carry" requirements have forced TCI to drop, reposition, or refuse to carry a significant amount of programming that it would have preferred to carry or at least carry on a different channel position.

To cite but three of the many example, TCI's Redlands and Colton, California systems were forced to drop The Weather Channel, VH1, CNBC, Trinity Broadcasting Network, and Sneak Preview, in order to add five broadcast stations each pursuant to the "must carry" rules. In Allen, Texas, a TCI system likewise was forced to drop MTV, Lifetime, American Movie Classics, CNBC, QVC and Request 2 to accommodate six "must carry" broadcast stations.

7. Second, dropping and rearranging channels to accommodate "must carry" demands have resulted in customer confusion and complaints. Because we carry services that our subscribers want, and because consequently dropping those services makes our subscribers unhappy, TCI did everything it could to avoid dropping services while still complying with the 1992 Cable Act. The problem has been magnified by the fact that often the broadcast stations that TCI has been forced to carry are unpopular or even duplicative. Not only are these stations unable to attract new subscribers, they also cause dissatisfaction among existing subscribers. The bandwidth that the channel occupies could be better used to offer programming that subscribers want.

8. Third, as a matter of policy, TCI prefers to launch a particular programming service on all or a significant number of its systems at the same time. As mentioned previously, TCI's cable systems have very little unused channel capacity. By using up channel space, "must carry" constraints have made it difficult, if not impossible, to operate within this policy.

9. Fourth, "must carry" rules have harmed TCI by denying it control over its own property. Indeed, even in instances in which broadcast stations would have been carried in the absence of the "must carry" rules, the rules have given TCI's systems less flexibility in the positioning of those stations. The rules also have removed the possibility that TCI itself could decide whether to continue carrying a station in the event of a format or quality change, even if subscribers express their preference for other programming over a "must carry" broadcast station.

10. Finally, the "must carry" rules have increased capital and administrative costs and caused a tremendous administrative burden for TCI and its individual systems.

11. The most important source of revenue for TCI is subscription revenue. Revenues from advertising comprise a small part—less than 5% in 1994—of TCI's total revenue. TCI currently is incapable of delivering national advertising on all of its systems. And digital insertion technology, which will improve TCI's advertising delivery capabilities, will not have a significant impact on TCI's cable advertising revenues for a number of years. Thus, TCI favors programming lineups that are popular with subscribers over lineups that may increase advertising revenues but are less popular with subscribers.

12. TCI's programming interests also have been injured by "must carry" requirements. Broadcast stations that TCI and other cable operators are forced to carry deprive cable programmers of channel space for which they could otherwise compete on the merits. This makes it harder for TCI and others to launch new programming services, regardless of subscriber demand for such services, and ultimately harms subscribers and cable operators through its effect of decreasing programming choices.

13. TCI continues to have its editorial discretion impeded by "must carry" requests up to the present day. Under the 1992 Cable Act, there were broadcast stations

that elected "must carry," but chose not to perfect their "must carry" rights because of the copyright liability they would incur. However, in 1994, Congress changed the copyright status of these stations pursuant to the Home Satellite Act. This has resulted in these stations perfecting their rights and forcing carriage on the cable systems. These new actions have further constrained channel capacity and further limit TCI's freedom of speech and editorial discretion in making programming carriage decisions.

14. It is important to TCI to carry broadcast stations that our subscribers value. In the absence of "must carry," "we carried, and would continue to carry, broadcast stations that our subscribers desire. TCI's business will not change in that regard. Furthermore, the advent of competing technologies, such as DBS, will make it more attractive to TCI to continue to provide local broadcast stations that these new technologies do not provide.

May 25, 1995

/s/ Brendan Clouston
BRENDAN CLOUSTON

[Jurat Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

APPENDIX TO
PUBLIC BROADCASTER DEFENDANT-INTERVENORS' MOTION FOR SUMMARY JUDGMENT

VOLUME 4

(EXPERT WITNESS DECLARATIONS)

* * * *

Dated: May 26, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

DECLARATION OF M. PETER DOWNEY

1. I am M. Peter Downey, and I hold the position of Senior Vice President of Program Business Affairs for the Public Broadcasting Service ("PBS"). In that position, I supervise PBS's contracting process with program producers and the monitoring of producers' compliance with PBS's administrative policies. I have held the position of Senior Vice President with responsibility for Program Business Affairs since 1980.

Background and Expert Qualifications

2. Prior to joining PBS, I spent 13 years in a variety of production-related positions at WGBH, a public broadcasting organization in Boston, Massachusetts. This included five years as a television producer-director, followed by eight years as Opeartions Manager for all of WGBH's film, television and radio production, and engineering operations.

3. I joined PBS in 1977 as Director of Operations and was responsible for managing the operational aspects of PBS's transition from terrestrial to satellite distribution of public television programming. In mid-1978, I was elected Senior Vice President for Corporate Affairs and served as principal management liaison to the PBS Board of Directors. In 1980, I was given responsibility for a variety of program support activities, including program scheduling, management of PBS's program purchasing mechanism (the Station Program Cooperative), contract-

ing with program providers, and managing various administrative policies related to the acceptance and distribution of programming.

4. Since 1980, I have, from time to time, supervised a number of additional PBS departments and activities, including advertising, promotion, corporate information, development, computer services, audience research, corporate administration, conference services, personnel, program data and analysis, and PBS Enterprises (PBS's for-profit subsidiary). Over the past seventeen years, I have played a significant role in numerous PBS policy and business initiatives, including: supervision of two different PBS cable program service initiatives (1980 and 1990); design and introduction of a new PBS corporate logo and corporate identification system (1984); several proposals for a PBS national advertising effort (1984-1986); development of new Nationa! Program Funding Standards and Practices (1987); development of new On-Air Offers Policies (1989); development of a new program management structure and pricing system (1988-1990); new producer contracting policies (1994); and numerous other corporate strategic plans and initiatives. In the course of my thirty-plus years of service in the public television industry, I have gained extensive knowledge of most aspects of public television, including programming, station and PBS operations, cable relations, viewership and membership patterns, and systemwide economic and strategic issues. In addition, I have become familiar with the objectives of public television and the ways in which public television's performance and achievements are ordinarily measured.

5. In my seventeen-plus years at PBS, I have authored dozens of intra-system white papers intended to describe and advance particular PBS policy and operational initiatives. I also collaborated in the writing of, and am the subject of, a Harvard Business School Case Study that examines "The PBS National Advertising Plan" that I

advanced in the mid-1980's.[1] In 1986, I authored a "Public Television Financial Abstract" for the PBS Board of Directors that detailed the macroeconomics of public television and laid the foundation for a transition four years later to a more centralized form of programming for public television. In 1988, I was the principal author of "PBS's Strategic Plan for the 1990's."

6. In my current capacities, I am called upon frequently as PBS's spokesperson on a variety of subjects including system finances, relations with cable, relations with corporate and foundation underwriters, PBS's contracting practices, PBS's poliices with respect to ancillary income from program-related activities, and similar matters. In August 1993, I submitted testimony to the U.S. Copyright Royalty Tribunal (Docket 92-1-90CD); in December 1989, I testified before the Copyright Board of Canada in the Matter of Royalties for Retransmission of Distant Radio and Television Signals to become effective January 1, 1990.

7. The opinions expressed below are based primarily on the knowledge and experience I have gained in connection with the many positions I have held at PBS and WGBH. In addition, I have consulted certain data and various studies, as indicated below. Where appropriate, I have cited the source of my information. I am also aware of the expert opinions that Jonathan C. Abbott and Dr. Roger Noll intend to express concerning public television stations in this case, and I believe my opinions are consistent with, and supportive of, their views.

Public Television Objectives:
Public Service, Universal Access, and Diversity

8. Public television is a not-for-profit business whose objective is public service, not private gain. The mission

[1] The PBS National Advertising Plan; Harvard Business School Case Study #0-587-152; Teopaca, John L. and Greyser, Stephen A.; © 1987, President & Fellows of Harvard College.

of public television is to provide quality programming and services to all Americans. The value of public television, therefore, cannot be measured in commercial marketplace terms. For public television, *every* viewer is important.

9. Local public television stations strive to fulfill the mission of public television by serving the diverse needs within their communities. For example, in addition to all those who benefit from public television's general services for audiences, an estimated 29.5 million school children attending approximately 70,000 schools now have daily access to public television's instructional programming services. Public television is the number one resource for classroom programming in the country, and these instructional services are used by nearly 2 million teachers. Public television also provides college telecourses for more than 325,000 degree-candidates each year. *See* Exhibit A to this Declaration.

10. Given public television's mission, the use of Nielsen ratings, for example, to measure the "worth" of public television would be wholly inappropriate. To illustrate, if all 325,000 degree-candidates were to view the same episode of a telecourse at the same time * * *. Judged by commercial standards, such a program would not survive. However, in public television, such a program would continue to be aired in order to serve the needs of the 325,000 degree-candidates.

11. Universal access is central to public television's mission. As Congress declared in The Public Broadcasting Act of 1967, public television services should be "available to all citizens of the United States." 47 U.S.C. § 396(a)(7). To help make its programming and services universally accessible, public television has been the leader in providing closed captioning for the hearing impaired, descriptive video service for the visually impaired, and foreign language programming, for example.

12. Consistent with the congressional policy of universal access, the Federal Communications Commission

("FCC") has allocated a portion of the broadcast spectrum to noncommercial educational television stations (commonly referred to as "public television stations") and required that those stations furnish a "non-profit and non-commercial broadcast service." 47 C.F.R. § 73.621. This has enabled the establishment of approximately 350 community-based stations that provide public broadcasting service to their respective communities.

13. Public television is also founded on the principle of diversity. 47 U.S.C. § 396(a)(5). Each public television station endeavors to provide programming that will serve diverse needs of viewers within the community to which it is licensed, particularly those who are unserved or underserved, such as minorities and children. Public television stations are operated and controlled by local institutions, and each station's programming choices and scheduling decisions are made entirely by that station. Where two or more public television stations serve the same community, they have been established to serve different community needs and they offer services that are not duplicative of one another. It is therefore untrue that "PBS" stations are all alike; rather, there are vast differences between and among the programming and other services provided by overlapping public television stations —perhaps more so than between and among commercial network affiliates. Attached as Exhibit B to this Declaration is a list of all of the second, third, and fourth PBS member stations in major markets and the special program niches they fill.

14. Even in the Washington, D.C. area, a unique market reached by five public television stations, each station targets its service to different audiences and seeks to provide a unique service to meet the needs of its respective audiences: (i) WETA, the largest of the five, offers mainstream PBS programming to a general audience; (ii) WHMM, licensed to Howard University, offers programming oriented to African-American audiences; (iii)

WNVC offers an "international" service with a broad variety of foreign language programming for international expatriates; (iv) WNTV, the sister station of WNVC, offers primarily instructional television services; and (v) WMPT/Annapolis, one of several transmitters owned and operated by Maryland Public Television, provides many programs with a focus on Maryland.

15. Furthermore, to the extent the same PBS programs are available to these stations, PBS's membership and financial policies strongly encourage public television stations in the same market to schedule the same programs at different times ("time-shift"). To illustrate, in the greater Los Angeles area, there are four public television stations: KCET, a community institution, provides a general audience service; KLCS, operated by the Los Angeles Unified School District, distributes instructional television programming to Los Angeles County public schools; and KVCR/San Bernardino and KOCE/Huntington Beach, both licensed to community colleges, distribute college telecourses for degree-seeking students. In addition to having differentiated services, these stations' program schedules are very different from one another and avoid the simultaneous broadcast of duplicative programming.

16. It is my expert opinion that *any* action that diminishes a local public television station's access to its intended audience would frustrate clear congressional policies of universal access and diversity, and would inhibit the public television station's ability to fulfill its public service misison. The loss of any station in a market diminishes the accessibility and diversity of public television programming available to all viewers in that market. Thus, wholly apart from any financial consequences, the diminution or denial of access harms public television stations and the public they are licensed to serve.

The Importance of Cable in Meeting Public Television's Objectives

17. Public television has long been dependent on cable carriage to achieve its objectives and, in particular, universal access. This is because cable carriage overcomes the signal reception problems that handicap viewers' access to public television stations. Approximately two-thirds of public television stations operate in the UHF band. *See* Exhibit C to this Declaration. Based on my experience and observations as head of engineering operations for WGBH, WGBX and WGBY in Massachusetts (channels 2, 44 and 57, respectively), I can affirm that UHF stations are at a significant disadvantage relative to VHF stations, and that this phenomenon particularly disadvantages public television.

18. Other things being equal, the quality of the UHF signal that is receivable in a community is inferior to that of the VHF signals. While, to some extent, these UHF/VHF differences could be mitigated by operating UHF stations at the highest permissible power level (500,000 watts of Effective Radiated Power), relatively few public broadcasters operate at this ERP level because it is difficult for a non-profit, noncommercial institution to justify the benefit of the additional reach the extremely high energy costs.

19. Cable also enables public television to overcome problems with poor signal quality. In particular, public television stations suffer from the fact that their transmission towers are often situated well away from the commercial towers serving the same community. This is sometimes the result of unaffordable land costs, or because the public television station is attempting to cover a whole region or state rather than a particular city. The consequence is that viewers' antennas are often oriented in another direction, thus diminishing the signal quality available to them.

Loss of Cable Carriage Results In Loss of Viewers of Public Television

20. Based on discussions with public television station personnel over the years, I am aware thaat a cable system's failure to carry a local public television station results in loss of viewership for that station. If a cable system drops a public television station, by definition, the system's subscribers can no longer receive the station's signal thronugh the cable. Depending on the strength of the station's signal, local terrain features, the existence of an outdoor antenna, its azimuth and elevation, the quality of the lead-in wire, the quality of the UHF tuner in the viewer's TV set, and other factors, a subscriber may be able to receive a "dropped" station's signal over the air. Based on the experiences of public television stations that have been dropped from cable systems, however, it appears that most cable subscribers either cannot or will not switch back and forth between their cable service and their antenna. In any event, depending on the quality of the over-the-air signal at the viewer's home, the benefit of an A/B switch may be marginal.

21. Based on discussions with public television station personnel over the years, I am aware that involuntary repositioning of a public television station from one channel to another on a cable system is likely to lead to a loss of viewers for the station. Virtually all public television stations identify and promote themselves within the community by their channel number. For the public, the "name" of a station is often the channel number on which viewers are accustomed to receiving such station. Any change in channel position on the cable system is a change of "address" that confuses viewers and can negate all the time and money the station has invested in building its local identity—through print and on-air promotion, through the creation of logos or other graphic materials that use the channel number, and so forth. Further, if the public television station is shifted to a different channel (usually higher), viewers will be less likely to tune in,

because of the lack of proximity to popular commercial network stations.

22. The problem of shifts is further exacerbated if the shift is to a channel that is so high that a cable subscriber cannot receive that channel without a "converter box." Many subscribers will be reluctant to purchase or lease this additional equipment and some may be unfamiliar with it or unaware of its availability. Even if cable companies provide their customers with the necessary physical equipment, these companies may not necessarily install it.

23. Thus, the subscriber may need to overcome a number of obstacles in order to receive a public television signal on its new channel assuming the cable subscriber even knows where to find the public television station. The station may be required to spend time and considerable resources on a promotion campaign to publicize its new channel location (or to obtain a reversal of the channel switch). Even when such campaigns are successful, the station is still likely to experience an extended loss of viewership until subscribers resolve their confusion and adjust to the new (or restored) channel location.

Loss of Cable Carriage Results in Harm to Public Television's National and Local Programming

24. As the Declaration of Jonathan C. Abbott explains, a station's loss of access to viewers due to cable drops and shifts will result in a loss of membership revenue and other forms of financial support for the public television station's service. This would have a direct adverse effect on the public television station's programming or other services.

25. To further the objectives of public service, universal access and diversity, public television stations must be able to meet their operating expenses. Whatever the mix of funding on which a particular public television station relies, any substantial loss of funds from any source

diminishes that station's revenue base and strains its ability to provide high quality programming and other services. A station's programming budget is more sensitive to financial reversals than almost any other station activity. This is because station operations represents the station's fixed costs, while programming is treated as a variable cost. Thus, when a station experiences marginal increases or decreases in revenues, the compensating adjustments are typically made in the station's programming budget. The significance is that any diminution in revenues—arising from a cable drop, for example—will most likely translate to a dollar-for-dollar reduction in programming budgets, and thus a direct diminution in the volume (and/or quality) of the programming provided by the station.

26. Moreover, revenue reductions are often "passed along" to PBS in the form of reduced station participation in the funding of the PBS National Program Service ("NPS"). As a direst result, the quality and quantity of programming distribted nationally by PBS to all public television stations is likely to be reduced, and this results in harm to all stations and their respective viewers.

27. Specifically, the programs made available by PBS through the NPS are a significant part of the programming that most public television stations offer. These NPS programs are financed in part by PBS's member stations. Prior to 1992, most NPS programs were acquired by stations through a member cooperative where the costs of each purchased program were apportioned among the stations that acquired that particular program. In 1992, the member cooperative was abandoned in favor of a delegation of spending authority to a chief program executive at PBS. Under this new approach, the chief program executive decides which programs to acquire and distribute. Stations still pool their resources under this approach, but they now pay for a "programmed service" rather than individual programs. In both cases, however, it is the aggregation of funds from all stations that makes

its possible for PBS to obtain programming, and the stations' contributions are leveraged so that, currently, an annual station investment of approximately $90 million yields $250 million to $300 million worth of NPS programming. PBS's ability to acquire high-quality productions for the NPS depends on the amount of money that public television stations are collectively able to aggregate for national programming, which in turn depends on their individual station revenues. Accordingly, the quality and quantity of NPS programming is related directly to the ability of each public television station to pay for it.

28. A reduction in revenues will also injure a station's ability to acquire programming from sources other than PBS. Most stations produce some amount of local programming, and they also acquire programming from regional public television networks and from commercial sources. The decision as to what programming to produce and/or acquire (including what amount of PBS programming to acquire) rests with the local station. Almost all public television stations subscribe to the NPS, but they pick and choose among the available programs, based on local considerations.

29. As noted above, due to cooperative financing mechanism for PBS programming, if some public television stations lose significant revenue as a result of adverse cable carriage actions, there will be a ripple effect on the programming available to all stations. Because reduced contributions from those stations diminish the overall pool of funds available for the NPS, all public television stations lose access to a certain amount of programming, or the quality of the programming drops, or both. If the quantity and/or quality of public television programming drops, it then becomes more difficult to attract viewers, donations, and underwriting, and this harms the entire public television system.

The Need for Must Carry Regulation

30. During the 1985 to 1992 period, I did not have responsibility for collecting information on adverse (or beneficial) cable actions involving public television stations and therefore did not personally maintain a systematic count of the numbers of cable drops and shifts. However, in the course of my conversations with public television station managers during this period, I became aware that there was considerable concern about the fact that cable systems had dropped some stations or shifted the channel of others. Particularly during the period from 1985 to 1988, it seemed that I was learning on a daily basis, about new drops and shifts and the detrimental effects resulting therefore. The apparent mounting numbers of such drops and shifts stations were creating considerable turmoil in the public television industry.

31. Moreover, based on my conversations with station manager, it appeared that there was a pattern of drops and shifts, and this was alarming. Specifically, during the 1985 to 1988 period, I became aware of instances where, over a relatively short period of time, several stations on cable systems owned by some of the nation's largest multiple system operators ("MSOs") had experienced unannounced drops. This posed a serious threat to any station carried by that MSO. Thus, even though a station that was being carried by that MSO was not ultimately dropped, the constant *threat* of a drop was disturbing to that station.

32. Further, it was a widely-held belief in the public television industry that the cable industry may have been on its "best behavior" during the late 1980s and early 1990s when Congress and the FCC were actively total number of drops and shifts may have been during this period, I believe that considerably more drops and shifts would have occurred absent the prospect of must carry legislation. Indeed, I and my public television col-

leagues believe that, absent any must-carry regulation, cable operators would feel free to drop and shift public television stations whenever it suited their economic interests. This would result in significant injury to public television stations, particularly those that are the second and third stations in a market.

Conclusion

33. Based on the foregoing, it is my expert opinion that must carry legislation serves an important interest in furthering public television's objectives. Cable carriage is critical to public television's ability to achieve its objectives, including public service, universal access, and diversity. A public television station's loss of cable carriage deprives its viewers in cable households of access to the station's programming and services, and deprives the station of the revenues that enable it to fulfill its mission. Particularly in periods such as the current one, when federal funding is in peril, the absence of must-carry rights would leave many public television stations with significantly fewer resources, with the result that public television stations' operations would be restricted, they would not be able to fulfill their public service mission, and the American people would be deprived of services.

May 25, 1995

/s/ M. Peter Downey
M. PETER DOWNEY

[EXHIBIT A]

[PBS Logo]

The Educational Power of Public Television
At a Glance

Kindergarten through 12th Grade

- Public television is the number one resource for classroom programming in the country.
- 1.8 million teachers have access to public TV's educational programming and services.
- 29.5 million students served.
- 70,000 schools reached throughout the United States.
- 1,500 individual instructional programs, including math and science, distributed annually via satellite.
- 300 programs in reading arts alone.
- PTV, The Ready to Learn Service on PBS, to be launched by 11 model-site stations in July 1994, will provide a nine-hour block of children's programming, increased support services and outreach materials for children, families and caregivers.

Higher Education

- PBS's Adult Learning Service (ALS) is the largest source of telecourses in the world. ALS added nine new telecourses in 1993, bringing the total to 58. Six more will be available in 1994.
- ALS has enabled more than 2.3 million adults to earn college credit since 1981.
- Over 325,000 students enrolled for college credit in 1992-1993, a 9.7% increase over 1991-1992.
- More than two-thirds of America's 3,000 colleges use ALS telecourses.

- Going the Distrance—ALS is developing this new service to offer students nationwide the opportunity to earn a two-year degree through college telecourses.

Distance Learning

- More than 5,000 high school students in 28 states take advanced mathematics, science and foreign languages through Satellite Educational Resources Consortium (SERC) "distance learning" courses (live classes linking teachers and students via satellite).
- 18 SERC courses are available, including probabiilty & statistics, discrete mathematics, honors world geography, Russian, Japanese, Latin, economics, calculus and physics.
- Telstar 401, PBS's new satellite, will aggregate public television and other services, creating the world's largest educational neighborhood in the sky.

Special Services

- Mathline—A new service, to be launched in Fall 1994, will use a variety of technologies to provide information, materials and training to help educators and parents teach math more effectively and to make math more effectively and to make math more fun and relevant for students.
- PBS ONLINE—A growing new electronic communication service that provides a wide variety of high-quality educational and informational materials to parents, teachers and students.
- Learning Link—The K-12 educational component of PBS ONLINE, the service is a dynamic curriculum tool and resource for teachers and students.
- Child Care—THE SESAME STREET Preschool Educational Program (PEP) and the MISTER ROGERS' NEIGHBORHOOD Child Care Partnership give child-

care providers educational resources for active, creative lessons tied to these series.

- Business—Over 500 businesses, from small to Fortune 500 companies, have used The Business Channel, video-based training programs available through PBS.
- Health Care—More than 1,000 hospitals have used PBS's interactive videoconferences and training programs to keep professional staff up-to-date on medical information, issues and trends.
- Agriculture—46 land grant colleges and two agencies of the U.S. Department of Agriculture use Ag*Sat, operated by Nebraska Educational Television, to reach thousands of agribusinessmen and women nationwide.

Prime Time

- Nearly 97 million Americans are informed by public television each week.
- "More than TV"—many PBS senes provide teacher and user guides and community outreach materials.

February 1994

[EXHIBIT B]

Major Market Overlapped Stations

Station	LUD %	Lic	Program Nichie	Overlaps
KBDI/Denver	25%	C	Counterculture/Ethnic	KRMA/Denver
KBTC/Tacoma	30%	U	College Credit	KCTS/Seattle
KBYU/Provo	50%	U	Children & Family	KUED/Salt Lake
KCSM/San Mateo	50%	U	College Credit	KQED/San Francisco
KLCS/Los Angeles	15%	L	K-12 Programming	KCET/Los Angeles
KMTP/San Francisco	5%	C	Ethnic Minority	KQED/San Francisco
KOCE/Hntngtn Beach	40%	U	College Credit	KCET/Los Angeles
KTEH/San Jose	50%	C	College Credit	KQED/San Francisco
KTLC/Okla City*	50%	S	Children & Educ	KETA/Oklahoma City
KULC/Salt Lake City*	15%	U	College Credit & Educ	KUED/Salt Lake City
KWSU/Pullman	25%	U	College Credit & Educ	KUID/Moscow
WHMM/Washington	50%	U	African-American	WETA/Washington
WLAE/New Orleans	25%	C	Children & Educ	WYES/New Orleans
WLIW/Garden City	50%	C	Acquisitions & Ent	WNET/New York
WLRN/Miami	12%	L	K-12, Community	WPBT/Miami
WNVT/Fairfax	25%	C	Ethnic Minority/Sports	WETA/Washington
WNYC/New York	27%	L	Ethnic Minority/Educ	WNET/New York
WNYE/New York	5%	L	K-12 and kids	WNET/New York
WPBA/Atlanta	50%	L	K-12, Community	WGTV/Athens-Atlanta
WQEX/Pittsburgh*	20%	C	Local, how-to	WQED/Pittsburgh

WUSF/Tampa	30%	U	College Credit	WEDU/Tampa
WYBE/Philadelphia	3%	C	Counterculture/Ethnic	WHYY/Philadelphia
WYCC/Chicago	13%	U	College Credit	WTTW/Chicago
WYIN/Merrillville, In	15%	U	College Credit	WTTW/Chicago

LUD % = the percentage of the PBS National Program Service acquired by the station.
LIC = Licensee type; whether Comunity, University, State or Local authority .
* = Duopoly (*i.e.* licensed to the same entity as the station it overlaps.

[EXHIBIT C]

STATUS OF THE SYSTEM

PUBLIC BROADCASTING SERVICE

SUMMARY — *April 1995*

NUMBER OF PBS MEMBER STATIONS			198
NUMBER OF FCC LICENSEES			175
NUMBER OF CSG RECIPIENTS (PBS and non-PBS)			202
NUMBER OF PBS TRANSMITTERS			345
Non-PBS VHF:	1	PBS UHF:	219
PBS VHF:	126	NON-PBS UHF:	4

MEMBERS

New Members in 1994

WAIQ/26, Montgomery, AL	On-air date: 12/18/62	Membership date: 7/1/94

New Members in 1993

*KMTP/32, San Francisco, CA	On-air date: 6/1/71	Membership date: 9/1/93

New Members in 1992

KTLC/43, Oklahoma City, OK	On-air date: 8/15/91	Membership date: 7/1/92
WEIU/51, Charleston, IL	On-air date: 7/1/86	Membership date: 2/21/92
WPTO/14/, Oxford, OH	On-air date: 10/1/73	Membership date: 10/9/92

CSG RECIPIENTS

CSG Recipients that are not PBS Members *5*

KRSC/35, Claremore, OK
WBCC/68, Cocoa, FL
WIPM/3, Mayaquez, PR
WMHQ/45, Schenectady, NY
WNVC/56, Fairfax, VA

PBS Members that are not CSG Recipients

WNYC/31, New York, NY — *1*

LICENSEES

FCC Licensees: — *175*

Community	91
Local	9
State	21
University	54

Licensee Changes in 1993

The license for KCTF/34, Waco, Texas, originally a repeater of KNCT/Killeen, and later an independent PBS Member Station licensed to Central Texas College, has been transferred to Brazos Valley Public Broadcasting, a community licensee.

The licenses for KOPB/KEPB/KOAD/KTVR have been transferred from the State of Oregon to Oregon Public Broadcasting, Inc., a community licensee, effective July 1993.

KTPS/28, Tacoma has changed its call letters to KBTC.

Non-member CSG recipient WMHX/45, Schenectady has changed its call letters to WMHQ. WMHQ went dark in *August, 1991* and resumed broadcasting, with its new call letters, in September, 1993.

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* KMTP's PBS membership originally began on 10/11/9 1, terminated on 12/31/92, reinstated on 9/1/93, and Finally terminated on October 1, 1994.

Licensee Changes in 1992

The licenses for the stations of the Maine Public Broadcasting Network and the license for WCBB/10, Lewiston have been transferred to the newly formed Maine Public Broadcasting Corporation, a community licensee.

Non-member CSG recipient KXON/45, Claremore changed its call letters to KRSC in July, 1992.

TRANSMITTERS

No New Transmitters in 1994

No New Transmitters in 1993

New Transmitters in 1992

KCDT/26, Coeur d'Alene, ID	On-air date: 9/27/92
KJRE/19, Ellendale, ND	On-air date: 5/12/92
KIPT/13, Twin Falls, ID	On-air date: 1/17/92

SERVICE TO UNSERVED AREAS

Non-PBS Entities providing PBS Programming under the PBS Unserved Areas Policy:

PBS Member Stations Relicensing PBS Programs	5
Low-Power Television Stations	22
Cable Systems	2
Total Persons Served	110,991

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

AFFIDAVITS IN SUPPORT OF TIME WARNER ENTERTAINMENT COMPANY, L.P.'S MOTION FOR SUMMARY JUDGMENT

* * * *

May 26, 1995

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

AFFIDAVIT OF FRED DRESSLER

FRED DRESSLER, being duly sworn, deposes and states as follows:

1. I am Senior Vice President of Programming for Time Warner Cable ("TWC") a division of Time Warner Entertainment Company, L.P. ("TWE"). I have held that position since 1987. The facts set forth below are personally known to me to be true.

2. TWC has been injured by the must-carry provisions of the 1992 Cable Act. The must-carry rules infringe upon TWC's First Amendment rights by forcing cable systems owned and/or operated by TWC and its Divisions, as well as those in which TWC has an interest ("TWC systems") to carry certain broadcast stations at the expense of programming that TWC might otherwise desire to deliver to its subscribers.

3. As Senior Vice President in charge of Programming, I regularly deal with programming services desiring to obtain or expand carriage on TWC systems or alter the terms of that carriage. As part of my responsibilities, I am in charge of evaluating the value and desirability of programming services, of contracting for carriage of such programming, and of advising individual Divisions as to

the desirability of carrying particular types of programming on their systems and the optimal mix of programming each system carries. There are currently approximately 128 national and 40 regional satellite-delivered cable services available for carriage to TWC and its Divisions. TWC and its Divisions choose among those competing programmers, and programmers considering the launch of new programming, as well as broadcasters and distant signals. In evaluating the wide variety of programming available to TWC cable systems, I consider the content of various programming services, the price of the services and other terms of a possible affiliation agreement. Choosing the content of the speech available to TWC systems and advising local systems about that content is one of the most important elements of my job. The must-carry provisions of the 1992 Cable Act hamper my ability to do my job both by interfering with the ability of TWC and its Divisions to speak using the content they desire and by limiting the content available for carriage on TWC systems.

4. To acquire programming for TWC systems, TWC often guarantees a certain level of carriage in exchange for the delivery of that programming at specified rates and conditions. Thus, the price of the programming may depend on the level of carriage reached on TWC systems and may vary accordingly during the course of the agreement. Because a significant portion of TWC channel capacity is occupied by must-carry broadcasters, TWC's ability to guarantee higher levels of carriage has been impaired, and TWC's ability to meet its existing contractual commitments has likewise been endangered.

5. The must-carry rules have interfered with launches of new cable programmers. Cable programmers derive revenue from license fees paid by distributors such as cable operators for the right to exhibit programming to their subscribers and from fees paid by advertisers who

sponsor programming on their service. Because license fees and advertising revenues depend upon the carriage of the service, it is crucial to the viability of a new service that it persuades as many operators as possible to offer the service to their subscribers.

6. New national cable programming services need to attract millions of subscribers in order to attain economic viability. Even new regional services may need to reach a million or more subscribers to survive. By requiring cable operators to devote substantial channel capacity to must-carry broadcast stations, the 1992 Cable Act deprives such services of vital opportunities to gain distribution.

7. The 1992 Cable Act's requirement that cable operators devote a substantial share of their channel capacity to must-carry broadcasters leaves less channel capacity for new cable programmers to compete for. On TWC systems, must-carry broadcasters occupy approximately 10% of channel capacity on average, and on specific individual systems, the percentage is often greater. Particularly when considered along with channels occupied by government-mandated leased access programming and PEG channels, all government-mandated programming takes up a significant proportion of channel space. The ability of these stations to tie up channel capacity without having to compete for it on the basis of that programming has caused many potential new cable programmers to fail (such as the Americana Cable Network) or to put off their launches of new services until such time as more channel capacity is available.

8. Because of the must-carry provisions, if TWC wishes to add new programming of its own choosing that does not qualify for must-carry status on systems where must-carry broadcasters have filled its channel capacity, it would have to increase its channel capacity at great expense, which would ultimately have to be borne by our

customers, thus requiring them to pay more without getting any additional programming that they truly desire.

9. TWC is injured when new cable programmers fail to launch. TWC seeks to deliver wide varieties of speech and ideas suitable to each community it serves. To persuade subscribers to purchase its product, TWC depends on its ability to offer a variety of programming. When new programming fails to launch, TWC loses its ability to add that programming to its lineups and likewise loses an opportunity to become more attractive to potential consumers.

10. Given the opportunity (including available channel capacity), TWC would have launched or seriously considered launching the following new cable services on some of its systems, at least on a test basis to evaluate their content and performance:

BET on Jazz

Discovery Network Time Traveler

Discovery Network/Living

Discovery Network/Quark

Adventure Channel

America's Health Network

Arts and Antiques TV

BBC/Reutera/Telemondo News Service

Booknet

Campus Television Network

Classic Sports Network

Collectors Channel

Fitness Interactive Television

Fox Movie Studio

Game Show Channel

Home Shopping/Horizon Cable

Mood on Demand Encore/Starz

S: The Shopping Channel/Fingerhut

Z Music

Lottery Channel

National Health Network

Muchmusic

Ole T.V.

Outdoor Life Channel

Ovation

RecoveryNet

SCOLA/Satellite Communications for Learning

T.V. Macy's

Newstalk TV

The Health Channel

Game Channel

Gaming and Entertainment Channel

GEMS Television

Golden American Network

Golf Network

How To Channel

Kaleidoscope/America's Disability Channel

Las Vegas Television Network

Univision

Viva Television Network

Women's Sports Network

World African Network

11. TWC also would have considered carrying the Americana Television Network on more of its systems if more channel capacity had been available. The Americana Television Network launched and went dark within the space of twelve months, due in part to lack of available channel capacity for which it could compete for carriage.

12. Because subscribers provide the bulk of cable revenues through subscription fees, programming is the mainstay of the cable business. When making programming decisions at TWC, the ability to sell advertising on cable services is not usually a consideration and has never been a deciding factor. Advertising is viewed as an incremental opportunity to be taken advantage of when and where possible.

* * * *

May 26, 1995

/s/ Fred Dressler
FRED DRESSLER

[Jurat Omitted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

AFFIDAVITS IN SUPPORT OF TIME WARNER ENTERTAINMENT COMPANY, L.P.'S MOTION FOR SUMMARY JUDGMENT

* * * *

May 26, 1995

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

AFFIDAVIT OF CHARLES W. ELLIS

CHARLES W. ELLIS, being duly sworn, deposes and states as follows:

1. I am Executive Vice President for Time Warner Cable, a division of Time Warner Entertainment Company, L.P., a position I have held since September 1986. I submit this affidavit to show the injury to Time Warner from the must-carry provisions of 1992 Cable Act.

2. I supervise operations in the following Divisions of Time Warner Cable: Greater Boston, Cincinnati, Columbus, Memphis, Northeast Ohio, New England, Reading/ Eastern Pennsylvania, Western Ohio and Western Pennsylvania. I have personal knowledge of the injury to the Divisions from the must-carry provisions of the 1992 Cable Act.

3. The must-carry provisions of the 1992 Cable Act have injured TWC. The must-carry provisions have required (and continue to require) TWC systems to use valuable channel space to carry certain broadcast stations that those systems did not and would not choose to carry. This mandatory carriage has resulted in a number of problems for TWC beyond the obvious First Amendment problems in being forced to provide certain speech and being barred from providing other speech in its place.

Customers on many TWC systems strongly objected to the loss of cable programming on their systems and its replacement with broadcasters who did not interest TWC customers. In other systems, customers objected to the removal of cable programming from basic tiers in order to add broadcasters customers did not want or could easily receive over the air. These incidents created considerable customer dissatisfaction that often reached the local franchising board, jeopardizing the TWC Division's status not only with individual subscribers but with entire franchises. By forcing TWC systems to carry broadcasters customers do not want at the expense of programming they want to see, the must-carry laws force TWC to allow its subscribers to believe TWC is not responsive to their needs and desires. Historically, one of the most important problems faced by cable systems, including TWC systems, has been (and still is) convincing consumers that the cable system is responsive to them and their needs. Customer satisfaction with programming and service is the most important goal of our business; any slippage in that area has dire consequences for subscription rates to cable.

4. The must-carry provisions of the 1992 Cable Act have also harmed TWC by causing TWC systems to reposition programming they want to carry on their headends in order to make room for broadcasters they are required to carry. On the simplest level, repositioning injures TWC systems because it requires them to invest time and money in notifying subscribers of changed lineups and in making the technological changes a repositioning requires. More importantly, repositioning injures TWC systems because it creates customer dissatisfaction. When a cable programmer is removed from the basic tier in order to add yet another home shopping station or a broadcaster providing local programming for an entirely different locality, customers object. They also object when cable programmers are moved to part-time status, or when a repositioning makes programming more

difficult to find. All of this adds to customer dissatisfaction and the perception of TWE systems as unresponsive to their customers. That dissatisfaction is substantially heightened when the system cannot explain the repositioning or other changes by pointing to the significant enhancement in programming quality that caused it, but instead has undertaken to displace desirable cable programmers with additional unwanted programming readily available over-the-air.

* * * *

May 25, 1995

/s/ Charles W. Ellis
CHARLES W. ELLIS

[Jurat Omitted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

AFFIDAVITS IN SUPPORT OF TIME WARNER ENTERTAINMENT COMPANY, L.P.'S MOTION FOR SUMMARY JUDGMENT

* * * *

May 26, 1995

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

AFFIDAVIT OF JOHN F. GAULT

JOHN F. GAULT, being duly sworn, deposes and states as follows:

1. I am Executive Vice President for Time Warner Cable ("TWC"), a division of Time Warner Entertainment Company, L.P. ("TWE"). I submit this affidavit to show the injury to plaintiffs from the must-carry provisions of the 1992 Cable Act. The facts set forth below are personally known to me.

2. In 1994, TWE through TWC and affiliated companies, owned and operated cable systems in approximately 2,100 franchise areas throughout the United States, which reached approximately 9 million subscribers. TWE built, acquired and renovated these costly assets to enable it to deliver the speech of its choosing to all those interested in hearing it.

3. I supervise operations in the following Divisions of Time Warner Cable: Appleton/Green Bay, Indiana/Illinois, Jackson/Monroe, Kansas City, Milwaukee, National, Oceanic and Shreveport. I have personal knowledge of the injury to the Divisions from the must-carry provisions of the 1992 cable act.

4. TWC and its local divisions exercise editorial discretion in determining which program services should be offered to subscribers. In making such determinations,

TWC personnel choose from among the entire array of programming services that are available. They take into account such factors as local tastes; local demographic characteristics, including such variables as age, household size and composition, income levels, occupational characteristics and education attainments; the quality of programming; the needs and interests of identifiable segments of the local population, including minority and ethnic groups and the availability of news, information and entertainment to cable subscribers from non-cable sources, including broadcast television stations, movie theaters, cultural and sporting events and non-electronic media. The content of programming services is often decisive in making such determinations. For example, a TWC cable system located in a conservative "middle American" community may choose to offer subscribers a greater array of Christian religious programming, while a TWC system located in a more ethnically diverse urban center might place greater emphasis upon program services, including those oriented to persons who speak languages other than English, that would have appeal to those audiences. For example, TWC's cable system in Queens, New York, a community rich in ethnic diversity, offers Greek, Korean and Hindi channels, among others.

5. TWC takes its programming decisions very seriously and exercises the same type of editorial discretion that newspaper editors employ in determining the content of the daily newspapers. In addition to individual systems discerning the best way to maximize customer satisfaction, TWC conducts numerous subscriber preference and satisfaction projects.

6. TWC cable operators try to continually refine their channel line-ups (now within the confines of the 1992 Cable Act) so as to increase subscriber satisfaction and appeal. The diversity of services offered can be quickly ascertained simply by comparing the channel line-ups of systems across the country. Where a particular program service is carried in all or virtually all TWC systems, it is because that service has demonstrated broad appeal to

United States television audiences and is an economically attractive choice.

* * * *

9. Even bandwidth which is already technically capable of use for analog channels cannot always be programmed. For example, some traps may trap too broadly to be confined to a single channel. A trap of a channel on channel 58 may also trap portions of channels 57 and 59, making those channels unprogrammable. There may also be unusable channels on a system because of interference, or because the channels are on an aeronautical frequency, or for other technical reasons within a system. For example, although the bandwidth from 0-54 MHz might theoretically be usable for the delivery of video programming, equipment manufacturers do not supply equipment to use that bandwidth.

* * * *

16. The must-carry provisions of the 1992 Cable Act have injured TWC. The must-carry provisions have required (and continue to require) TWE systems to use valuable channel space to carry certain broadcast stations that those systems did not and would not choose to carry. This mandatory carriage has resulted in a number of problems for TWC beyond the obvious First Amendment problems in being forced to provide certain speech and being barred from providing other speech in its place. Customers on many TWC systems strongly objected to the loss of cable programming on their systems and its replacement with broadcasters who did not interest TWC customers. In their systems, customers objected to the removal of cable programming from basic tiers in order to add broadcasters customers did not want or could receive over the air. These incidents created considerable customer dissatisfaction that often reached the local franchising board, jeopardizing the TWC Division's status not only with individual subscribers but with entire franchises. By forcing TWC systems to carry broadcasters customers do not want at the expense of programming they want to see, the must-carry laws force

TWC to allow its subscribers to believe TWC is not responsive to their needs and desires. Historically one of the most important problems faced by cable systems, including TWC systems, has been (and still is) convincing consumers that the cable system is responsive to them and their needs. Customer satisfaction with programming and service is the most important goal of our business; any slippage in that area has dire consequences for subscription rates to cable.

17. The must-carry provisions of the 1992 Cable Act have also harmed TWC by causing TWC systems to reposition programming they want to carry on their headends in order to make room for broadcasters they are required to carry. On the simplest level, repositioning injures TWC systems because it requires them to invest time and money in notifying subscribers of changed line-ups and in making the technological changes a repositioning requires. More importantly, repositioning injures TWC systems because it creates customer dissatisfaction. When a cable programmer is removed from basic in order to add yet another home shopping station or a broadcaster providing local programming for an entirely different locality, customers object. They also object when cable programmers are moved to part-time, or when a repositioning makes programming more difficult to find. All of this adds to customer dissatisfaction and the perception of TWE systems as unresponsive to their customers. That dissatisfaction is substantially heightened when the system cannot explain the repositioning or other changes by pointing to the significant enhancement in programming quality that caused it, but instead has undertaken to displace desirable cable programmers with additional unwanted programming readily available over-the-air.

* * * *

May 25, 1995

/s/ John F. Gault
JOHN F. GAULT

[Jurat Omitted]

FOR THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

DEFENDANTS' JOINT SUBMISSION OF EXPERT AFFIDAVITS AND REPORTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

VOLUME II.A

* * * *

Dated: May 26, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

EXPERT DECLARATION OF JOHN R. HARING

I, John R. Haring, depose and say as follows:

1. I am submitting this Declaration in support of the motion for summary judgment made by defendants in the above captioned proceeding.

2. I received M.Ph. and Ph.D. degrees in economics from Yale University. Between 1983 and 1990 I worked at the Federal Communications Commission, where I was the Chief of the Office of Plans and Policy, and then the Chief Economist of the FCC. I am currently a Principal of Strategic Policy Research, Inc., an economics and public policy consulting firm, where I provide consulting services to a variety of clients in the mass media and telecommunications industries. Additional details regarding my qualifications as an expert in this proceeding can be found in Exhibit A, hereto.

* * * *

21. Loss of cable carriage can reasonably be expected to cause a broadcast station's advertising revenues to decline, and that loss of revenue-producing potential will, in turn, likely cause a reduction in profits, program expenditures, and the quantity and quality of over-the-air broadcast programming. In 1991, two FCC (Yale Ph.D.) economists prepared an extensive analysis of the plight of broadcast television in the current video marketplace. *See* Florence Setzer and Jonathan Levy, "Broadcast Television in a Multichannel Marketplace," Office of Plans and

Policy Working Paper Series No. 26, FCC, Washington, D.C., June 1991. They conclude that:

> Broadcast television . . . has suffered an irreversible long-term decline in audience and revenue share, which will continue throughout the current decade. In the next ten years, broadcasters will face intensified competition as alternative media, financed not only by advertising but also by subscription revenues, and offering multiple channels of programming, expand their reach and their audience. Television broadcasting will be a smaller and far less profitable business in the year 2000 than it is now. Although broadcasting will remain an important component of the video mix, small-market stations will find it particularly difficult to compete, and some are likely to go dark.

These authors note (*Ibid.*, p. 3) that their "study shows that a reduction in the quantity and quality of broadcast service is highly likely." Owen and Wildman, *Video Economics*, Harvard University Press, 1992, p. 255, note that: "Ultimately, of course, the disadvantages of over-the-air broadcast stations (limited channels, single channels, and no practical means to charge viewers) may lead them to be superseded entirely, either by cable or by some different technology. But not in the 1990s."

22. A station's advertising revenue depends in part on the number of commercial exposures it can supply, and the number of exposures a station produces depends on the fraction of its potential audience it can attract with its programming. Loss of carriage reduces potential audience size and thus the actual audience size (number of exposures) any given fraction can produce. The empirical work of Mr. Meek and Dr. Rohlfs confirms the existence of this relationship between potential and actual audience size. *See* Expert's Report of Tom Meek and Expert's Report of Jeffrey H. Rohlfs.

23. The relationship between cable carriage, audience size, and advertising revenues for a broadcast station, is widely recognized and forthrightly acknowledged by the cable industry in cable industry documents produced as a result of discovery in this case. For example, in June of 1993 the Times Mirror Company, a large MSO, conducted "A Study to Assess the Impact of the Loss of Cable Carriage for a Broadcast Television Station." This study, and related documents, are appended hereto as Exhibit B. (pages TM 000222—TM 000234)

24. This study concluded that "the ability of a broadcast television station to easily reach its audience through cable television is crucial. . . . If the number of viewers (as measured by ratings) changes then advertising revenues will also change. . . . The loss of cable carriage could cause a significant decrease in a station's ratings and a resulting loss in advertising revenues." Exhibit B, at p. TM 000224.

25. The study examined the impact of loss of all cable carriage on an actual broadcast station in a market that had only 47% cable penetration, and concluded that "a drop as small as 10% in the number of cable viewers could result in a decline of $3.0 million in advertising revenues. . . . In a market with higher penetration, the impact would be even greater." Exhibit B, at p. TM 000225.

26. As its revenue-producing potential declines, a station's derived demand for programming also declines, likely resulting in a reduction in the quality and/or quantity of its programming and the audience fraction it can expect to attract. Reductions in the quantity and quality of broadcast programming will reduce the economic welfare of viewers, especially those who rely on over-the-air reception, but potentially others as well (*viz.*, subscribers

to cable systems on which dropped or uncarried stations retain carriage).

27. Cable carriage has been a significant factor explaining growth in the number of UHF television stations, and the loss of carriage may reasonably be anticipated to speed their decline. In the past, UHF suffered from well-known problems with over-the-air reception that limited the potential size of the audience for UHF stations. This, in turn, inhibited UHF stations' ability to program competitively. Noll, Peck and McGowan, *Economic Aspects of Television Regulation,* Washington, D.C.: Brookings Institution, 1973, p. 103, observe that: "The fundamental problems of UHF stations are small audiences and low revenues, and, hence, the inability to provide better than low-budget programming." These problems inhibited the growth of UHF service for many years. Cable carriage improved the quality of UHF reception and helped foster a significant expansion of the service. A recent economic study (*see* Economists, Inc., *An Economic Analysis of the Prime Time Access Rule,* March 7, 1995) presents evidence indicating that carriage of UHF stations on cable into a rising number of cable households has served to eliminate or reduce greatly the so-called "UHF handicap."

* * * *

31. Cable system operators have equity positions in many cable program services. In its *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming* (September 28, 1994), the FCC reports that the number of vertically-integrated national programming services has grown substantially since 1990, and that approximately 53 percent of programming services were integrated with cable operators in 1994. These equity positions give cable system operators an opportunity to share in the earnings of such services, which typically reflect sales of national advertising and

payments from system operators. A cable system operator therefore has a rational economic incentive to drop a broadcast station and substitute a cable program service in which the operator has a financial interest, whenever the operator expects the gains from increased carriage of the cable program service, including the benefits from equity participation, will exceed any losses from dropping the broadcast station.

32. Cable advertising revenues are growing and are expected to increase rapidly, and cable system operators are aggressively pursuing opportunities to increase their advertising revenues. *Cable TV Advertising* reports that gross cable television advertising billings had reached nearly $4 billion by the end of 1993 and forecasts gross billings in excess of $10 billion by 2001. The large multiple cable system operators (who serve the bulk of subscribers) are implementing programs to upgrade advertising hardware and software, improve employee skills, and supply closer substitutes for broadcast national spot advertising through greater *clustering* of systems and utilization of *interconnects. See, inter alia,* Paul Kagan Associates, *The 1993 Cable TV Advertising Report;* Paul Kagan Associates, *The Cable Interconnect Report* (various numbers); Paul Kagan Associates, *Cable TV Advertising;* Larry Zipin, "Local Cable Advertising Sales: 1992 and Beyond: Revised"; *Comcast Cable Advertising:* National Sales Meeting; Tele-Communications, Inc., *Cable Advertising,* March 1994; TCI Advertising Sales Executive Summary, January 11, 1993; TCI Advertising Strategic White Paper, January 1, 1992; Times Mirror Cable Television, *Strategic Plan,* 1991-1995; Cable Advertising Bureau Five-Year Strategic Plan, *Local Advertising Development,* February 1, 1993; American Television and Communications Corporation, *Strategic Plan for the 1990s,* November 29, 1988; Time Warner Cable, *1994 Business Plan;* Time Warner Cable, *Ad Sales Status Report 1993;* Time Warner Cable, Presentation to the Time Warner

Board of Directors, July 18, 1991; Cable Advertising Bureau Report, *Regional Networks* (undated).

33. Additional documents supporting my conclusions regarding the relevance and increasing importance of local advertising revenues, as an increasingly important component of total cable system revenues, can be found in Defendants' Joint Volume VII, at Exhibits 216, 218, 223, 229, 230, 232, 233, 242, 243, 244, 245, 246, 247, 248, 249, and 257. Because of the volume of those documents, they are not separately attached to this Declaration.

34. A cable system operator possesses a rational economic incentive to drop a broadcast station and substitute a cable program service on which the operator can sell local or national spot advertising, whenever the operator expects the gains from carriage of the cable program service will exceed any losses from dropping the broadcast station. In a Time Warner document appended hereto as Exhibit C (pages TWS 0163 - TWS 0181), Larry Zipin, Vice President—Advertising Sales, Warner Cable Communications, Inc., "Local Cable Advertising Sales: 1992 and Beyond," November 20, 1991, p. 6, states that: "As a result, anything that places a limitation on the size, composition, and accessibility to the Cable Advertising Audience, diminishes Ad Sales' revenue potential; and, conversely, anything that increases the size, composition and accessibility to the Cable Advertising Audience increases Ad Sales' revenue potential." Zipin (p. 6) notes that: "Since viewership requires converting the subscriber base into a Basic Cable *Audience*, then an MSO impacts viewership with *every decision regarding channel carriage, dial position, tiering/packaging and most specifically tune-in advertising/cross channel promotions* (emphasis added)." Zipin (p. 8) states that: "Eliminating video tape and moving towards computer processing should

overcome the obstacles that currently place limits on commercial insertion accessibility. It is estimated that prototypes will be available in 1992; with 1993/1994 as a probable horizon that would make a company-wide conversion of technology possible." Zipin (p. 11) states that: "It is anticipated that this software will be available for industry-wide proliferation by mid-1992. Since these designs include interactivity with existing hardware and multi-headend configurations, it represents the type of revolutionary technological advance that will raise the revenue potential of the entire business to new levels." Finally, Zipin (p. 14) notes that: "It is important to point out, that even when the capacity to access this inventory improves, this inventory is, nonetheless, finite. Unlike local TV and Radio—but more like Newspapers—Cable Systems may be in a position to create 'as much inventory as they can sell'. This relates to the issues of Cable Operators becoming programmers of their own local channels, regional/local news channels, etc. To whatever extent these ventures are successful in attracting an audience; Cable Advertising Sales potential also increases proportionately with its ability to reach these audiences with commercial messages." In a Time Warner Cable Memorandum from Don Stone to Bill Grimstead, dated May 25, 1994, Mr. Stone worries that competition from a low-power transmitter would lower cable advertising sales and inquires whether: "To deal with this competitive threat, could we refuse to carry this low power feed and continue to carry KMPH like we are now. This would keep Bakersfield advertisers from having access to the Time Warner homes through KMPH's low power signal and force them to buy in Fresno to reach Bakersfield. It would also be more difficult for KMPH to sell in Bakersfield without the Time Warner homes."

* * * *

37. Generally, the only potential loss to a cable programmer of dropping a local broadcast station is the possibility that a station will be so highly valued by cable subscribers that a substantial number of those subscribers would cancel (or be willing to pay significantly less for) their cable subscriptions if that station were dropped. Thus, in general, a cable operator is likely to drop lower valued, lesser viewed broadcast stations before dropping more highly valued stations with more substantial viewership.[1] This suggests that in the near future, absent a must carry requirement, cable operators would be more likely to drop independent stations, particularly UHF stations, than they would be to drop network affiliate stations. Over time, however, as the incentives and opportunities to substitute cable programming for broadcast programming increase, cable operators would be increasingly likely to drop even network affiliate stations.

* * * *

44. I want to emphasize the importance of a trend that will both make it more likely that local broadcast stations will be dropped, and will increase the impact of a drop

[1] **The strength of the demand for a local broadcast station, as for a cable program service, is not accurately gauged simply by the number of viewers who watch that program once a week or more. A particular station may have 20,000 viewers, but most of those viewers may have only slight interest in the programming of that station, and would not cancel their cable subscriptions (or be willing to pay substantially less) if that station were dropped. Conversely, a particular station—say, a foreign language station—may have only 5,000 viewers, but they may care passionately about that station, and would cancel their cable subscriptions (or be willing to pay significantly less) if that station were dropped. Thus, from the perspective of the cable operator, the demand for a particular broadcast station (or for a particular cable programmer), cannot be measured simply by the ratings of that station or cable programmer. For example, many of the premium or pay TV cable programmers have modest ratings, but they are nevertheless carried because there is obvious demand for those programmers by cable subscribers who are willing to pay an additional fee to receive them.**

should one occur. This is the marked trend towards increasing horizontal concentration, clustering, and interconnects, that is, greater effective economic *integration*, among cable operators. If there are 25 independent cable operators in a particular television market, each serving the same number of subscribers, if one of those cable operators substitutes a cable programmer for a local broadcast station, the broadcast station will still have access to 24/25ths of its potential cable household audience, and the local ad availabilities made available to the cable operator by the substituted cable programmer will only reach 1/25th of the potential cable households in that television market. But if one MSO owns or controls all of the cable systems within a particular television market, and decides to substitute a cable programmer for a local broadcast station on all of the cable systems in that market, the broadcast station will have lost all of its potential cable household audience, and the local ad avails made available to the cable operator by the cable programmer will be able to reach 100% of the potential cable households in that television market.

45. Others have noted the clear and undisputed trend toward increased horizontal concentration, clustering and interconnects. I note that as of June 1993, in almost half of the ADIs in this country (94 out of 200), one MSO controlled 50% or more of the cable subscribers. Memorandum from Jay L. Kriegel to Jim May, June 10, 1993 (DAE VOL. VII, EXH. 213). Data produced by Time Warner, which provides information on the fifty largest ADIs, indicates that as of June 1992, even before the Cable Act was enacted, in twenty of these ADIs a single MSO already controlled 50% or more of the subscribers, and in eleven of these ADIs a single MSO already controlled 40% or more of the subscribers. And in ten of the remaining ADIs, a single MSO already controlled between 30-40% of the cable subscribers. "MSO Consolidated Analysis," June 2, 1992 (TWS 0011 1752; DAE VOL. VII, EXH. 207). Additional documents support-

ing my conclusions regarding the relevance and increasing importance of clustering and horizontal concentration can be found in DAE VOL. VII, EXH. 213, 214 and 237. Because of the volume of the exhibits referred to in this paragraph, they are not separately attached to this Declaration.

46. In summary, it is my opinion, as an economist familiar with these industries, that there was a reasonable basis for Congress to conclude that, absent a must carry requirement, the economic health of local broadcast television would be in genuine jeopardy. Given the *increasing* incentives and opportunities for cable operators to substitute cable programming for broadcast programming, Congress had a reasonable basis to make the predictive judgment that, absent must carry, an increasing number of local broadcast stations would be dropped, not carried, or otherwise disadvantaged by cable operators acting in their own economic self-interest.

47. It is also my opinion, as an economist, that local broadcast stations who were dropped or denied carriage by cable operators would suffer significant financial injury and would be compelled to reduce the quantity and/or quality of their programming. As a consequence, over time a significant number of them would be likely to go off the air, resulting in an absolute decline in the number of local broadcast stations. Decreases in the quantity and quality of over-the-air viewing options will harm consumers who do not subscribe to cable, with adverse distributional consequences to the extent that nonsubscribers have low incomes.

48. Finally, it is also my opinion, as an economist, that the must carry requirement is rationally and coherently related to the Congressional goals, and will directly and materially further those goals.

May 25, 1995

/s/ John Haring
JOHN HARING

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

AFFIDAVITS IN SUPPORT OF TIME WARNER ENTERTAINMENT COMPANY, L.P.'S MOTION FOR SUMMARY JUDGMENT

* * * *

May 26, 1995

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

AFFIDAVIT OF ROBERT A. HILLYER, JR.

ROBERT A. HILLYER, JR., being duly sworn, deposes and says:

* * * *

9. On the 9 systems we operate, we are carrying 1 or 2 commercial broadcast channels subject to must carry rules and 2 to 4 commercial broadcast channels subject to retransmission consent. We are also carrying 1 or 2 PBS channels subject to the educational television must carry rules. Between 29% and 46% of the basic service channe:s we offer are commercial and PBS channels subject to must-carry or retransmission consent. Although Hillcom's cable systems are very small, represent an insignificant market, and are barely economically viable, we are not considered small cable systems under must-carry because we offer more than 12 channels per system. Thus we can be required to carry up to 7 qualifying commercial and 3 qualifying PBS broadcast channels out of a maximum capacity potential of 18 to 21 channels. This is extremely prejudicial to other existing or potential programmers, and limits our ability to provide the most attractive service possible with our limited resources.

* * * *

May 25. 1995

/s/ Robert A. Hillyer, Jr.
ROBERT A. HILLYER, JR.

[Jurat Omitted]

FOR THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

DEFENDANTS' JOINT SUBMISSION OF EXPERT AFFIDAVITS AND REPORTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

VOLUME II.B

* * * *

Dated: May 26, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

EXPERT DECLARATION OF CHARLES L. JACKSON

I, Charles L. Jackson, depose and say as follows:

1. My name is Charles L. Jackson. I am a Principal of Strategic Policy Research, Inc. (Strategic Policy Research), an economics and public policy consulting firm located in Bethesda, Maryland I provide consulting services to a variety of clients in the mass media and telecommunications industries. Before co-founding Strategic Policy Research in 1992, I was a Vice President of National Economic Research Associates, Inc. (NERA) and, prior to that, co-founded the consulting firm of Shooshan & Jackson Inc. which merged its practice with that of NERA Before beginning consulting, I served on the staff of the Communications Subcommittee of the US. House of Representatives and was on the staff of the Federal Communications Commission. I have authored or co-authored numerous studies on public policy issues in telecommunications and have testified before Congress on issues of technology and telecommunications policy. I earned the B.A. degree from Harvard College in Applied Mathematics and the degrees of M.S., E.E. and Ph.D. in Electrical Engineering from the Massachusetts Institute of Technology. My full curriculum vita, including publications and prior testimony, is attached as Exhibit A.

2. The capacity of cable systems—the number of channels delivered to subscribers has—grown from a few channels in the early days of cable to more than a hundred in state-of-the-art systems and will continue to grow for many years to come Improvements in technology, primarily improved amplifiers and fiber optics, have permitted this capacity expansion in the past Improvements in these areas and in digital compression, storage and switching will be behind the capacity expansions of the future. Digital compression permits putting about six digital TV signals over a cable channel that now carries one analog channel Full adoption of digital compression would expand cable capacity roughly six-fold. Use of digital compression to serve only a few customers, a less costly option, can free up capacity for services to all subscribers. Cable system operators are motivated to install equipment that improves capacity for three primary reasons: (1) the additional capacity lets them make more money, (2) franchise requirements or franchise-related political decisions dictate such an expansion, and (3) as equipment wears out it is replaced with higher-capacity equipment. My view of the future of cable capacity is quite conventional It was widely held in 1992 and could be found in journal articles, trade press articles, equipment manufacturers' advertisements and statements by cable firms. Credible witnesses, including the Chairman of the FCC and the spokesman for the National Cable Television Association, testified before Congress in 1992 supporting such a vision of the future.

3. The capacity of a cable ssytem is normally measured in channels. There are different measures of capacity. One is the number of channels of television program service a consumer can chose among at one time. This is the activated capacity of the cable system. Another measure is the total number of channels in a system that the cable operator could activate without extensive investment—I call this the actual capacity of a system. For example, a system may have an actual capacity of 60 channels but an activated capacity of only 55 channels. At any time the activated capacity can be easily measured with little dispute. The actual capacity is, of course, always larger but is a softer number There are channels, for example the two known as A-1 and A-2, which many cable system managers prefer not to use because of the potential for interference from the cable system to aero-

nautical navigational systems. If a cable system chooses to use channels with potential to interfere with aeronautical communications, they must be more vigilant in guarding against signal leakage from the cable system. In many systems adding additional channels results in a slight degradation of the quality of the existing channels on the system. Hence, the limit on the number of channels that can be added is set, in part, by the acceptable quality loss on the other channels. Finally, there is the capacity of state-of-the-art systems. Cable systems are built with a variety of vintages of plant and equipment. One additional useful measure of capacity is the actual capacity of a brand-new, top-of-the-line cable system built with current technology. I call this the state-of-the-art capacity. In the discussion below I show how the state-of-the-art capacity has improved over time.

4. Cable capacity, however measured, has grown enormously over time. Early state of the art cable systems had 12 or fewer channels. Today, start-of-the-art cable systems can carry about 160 analog channels or a thousand digital channels. A comprehensive 1971 study described the state-of-the-art as 25 or 26 channels [*See On the Cable: The Television of Abundance*, Report of the Sloan Commission on Cable Communications, McGraw-Hill, 1971 (DAE VOL. VII.R, EXH. 430), p. 192.] Today cable operators run systems with a capacity of 160 channels. This is an increase in the capacity of state-of-the-are systems of 135 channels or slightly more than 600 percent over 24 years. On an annual basis, this is an increase of about five channels per year in the state of the art or a compound growth rate of cable capacity of about eight percent per year. Another way to view the historical growth of capacity is to consider the activated capacity available to the average cable subscriber over time. Paul Kagan Associates provided estimates of this quantity in their publication *The Kagan Media Index* [September 30, capacity in 1984 to have been 23.4 channels and the 1994, p. 2]. Kagan shows the average cable channel

capacity in 1994 to be 43.6 channels. By these numbers, the average subscriber gained access to 20.2 additional channels in ten years—a growth rate of about two channels per year. These two estimates of annual cable capacity growth are roughly consonant—with state-of-the-art capacity growing at five channels per year and operational capacity growing at two channels per year. Clearly one would expect the possible to grow faster than the realized. The limits of the possible have grown and cable has been implementing the improved technology.

5. Several forces drive cable operators to increase their system capacity. First, of course, is the added opportunity to carry additional services and thus justify higher rates to consumers made possible by increases in channel capacity. Second, local franchise authorities frequently request or require capacity upgrades at the time of a franchise renewal or transfer. Third, cable systems, like trucks or air conditioning systems, degrade over time and ultimately have to be refurbished—a process that is called a "rebuild" in the cable industry. Such system rebuilds typically occur once every 10 or 15 years. At the time of a rebuild, it is natural to upgrade the system to current technology—a step that expands channel capacity. Thus, just the wear and tear of the elements combined with the changes in the available technology would cause cable systems to expand capacity over time.

6. I expect the substantial expansion of channel capacity throughout the cable industry to continue over the next several years. The historical trends of the last quarter century will continue—although growth, measured in sheer channel numbers, will be greater in the future than in the past. The future will bring enormous expansion of cable capacity. Further, the basis for my belief in future capacity expansion is so strong and broad that I believe that it would be unreasonable for any similarly informed person to believe otherwise. Moreover, it was reasonable in 1992 to anticipate that these expansions would occur. My view is based upon consideration of

(1) the state and trends in the basic underlying technologies, (2) product announcements, and advertisements by manufacturers, (3) statements by cable executives about plans to adopt new technologies, (4) reports from the cable industry research consortium, CableLabs, on new technology, (5) congressional testimony by representatives of the cable industry, (6) examination of planning documents, capacity surveys and other documents provided by the plaintiffs as part of the discovery process, and (7) my experience and familiarity with the industry.

7. One route to capacity expansion has been improvements in cable electronics—most notably cable system amplifiers, but also modulators, converters, passive devices and cable itself. Modern cable electronics permit building or upgrading cable systems to 550 MHz or even 1000 MHz (1 GHz) capacity. A 550 MHz cable system can carry about 80 channels of programming, a 750 MHz system can carry about 110 channels and a 1 GHz system can carry 160 channels of traditional analog television signals. As a result, expanding capacity to 1 GHz (or 160 channels) of information capacity in an alluring way for cable operators to position themselves to offer the many anticipated video and information services to the home. Upgrades are becoming cheaper over time—TCI recently announced implementation of a new network architecture that would allow it to upgrade from 300 MHz to 750 MHz with only a 10 to 15 percent increase in extra cable placement. [*See* "TCI Details New Architecture," *Multichannel News,* April 3, 1995 (DAE VOL. VII.R, EXH. 431), p. 43.]

8. Fiber optic transmission offers a second route to capacity expansion. Fiber optic cables have thousands of times more carrying capacity than the earlier coaxial cable technology. Today's practical fiber systems exploit only a small fraction of fiber's capacity. Even so, they provide cable system operators with valuable building blocks. Installation of fiber optic systems offer cable systems efficiencies. Fiber systems provide greater reliability than

the older coaxial cable and carry signals longer distances without amplification, reducing service costs. Installing fiber backbone in a cable system reduces the number of amplifiers in cascade between the headend and the average consumer substantially increasing the reliability of cable service. Fiber backbone also permits either an expansion of the cable system's capacity, an increase in picture quality at the residence, or some combination of channel expansion and picture quality improvement. Additionally, installing fiber prepares cable companies to compete in other telecommunications markets such as voice telephony and mobile communications. I believe that the cost of installing fiber backbone in a cable system is affordable. The costs of fiber upgrades vary depending upon the density of the cable system, the number of households served by each fiber node and other factors. I understand that the costs of such upgrades can be as low as $40 or $50 per subscriber and range up from that point depending upon how deep fiber is put into the cable system. [*See* "Evolving from FSA to passive cable networks," *CED: Communications Engineering & Design,* September 1994, p. 60.] The adoption of fiber by many cable operators indicates that fiber is affordable. Industry analysts also recognize this affordability. For example, one study shows a fiber upgrade cost of $90-225 of capital expenditures per subscriber. [*See* "The Cable Television Industry: New Technologies, New Opportunities and New Competition," March 8, 1993 (DAE VOL. VII.R, EXH. 426), at 1.]

9. Digital compression is a third driving technology behind channel expansion. Compression does not preclude—and, in fact, complements—fiber optic technology and analog bandwidth expansion. Digital compression is a way of transmitting video and audio signals by converting a TV picture to a series of "Is" and "0s", and then eliminating redundant information, thereby reducing the amount of data that needs to be sent. Similar processes are familiar to anyone who has watched a letter go through a fax machine. When the fax scanner moves

beyond the signature line, the page speeds up. This is because fax machines use a simple form of data compression—using an abbreviation to indicate an all white region. Typical digital compression systems being deployed by the industry can compress typical video programming by about a factor of 6 to 1. That is, six compressed digital signals can fit into a channel that carries only one convention analog signal. The biggest part of the cost of converting a cable systems arises from the digital converter boxes that must go into each household that gains access to the digital signals. Such converter boxes cost about $200 today. Since much of the cost of these boxes arises from their internal digital electronics, the cost of these boxes should fall just as the price of computer memory chips has fallen over the last decade. Notice that it is not necessary to install such boxes in all households to gain additional channel capacity throughout a cable system. Consider a cable system with several pay services. Assume that the lowest penetration pay service is subscribed to by only 10 percent of subscribers. Installing digital converters for that 10 percent and moving the pay service to digital frees up the channel previously carrying the pay channel. More generally, if cable systems use digital capacity to provide pay services, then they can migrate most pay services to digital and free up several channels without having to purchase a digital converter for all households. Market analysts consider deployment of digital services to be affordable. One group estimated digital compression deployment of digital services to be affordable. One group estimated digital compression deployment costs in the 1994-2000 time frame to be about $170 per subscriber. [*See Ibid.*] And, like fiber, compression techniques are highly likely to improve and become cheaper over time.

10. Improving technology for traditional cable service as well as the potential to offer additional services in the future will motivate continued and accelerated channel capacity expansion within the cable industry. This view

is supported by results of cable capacity analyses conducted for networks interested in the potential for carriage on cable systems. A November 1994 "State of Cable Operator Survey" conducted by Horowitz/Cohen found that 65 percent of operators surveyed intended to increase capacity to a projected average of 79 channels within the next two years. [*See* D00985, D001123 (DAE VOL. VII.R, EXH. 91).] Kagan's March 1994 "Cable TV Technology Report" reported that cable operators were focusing on channel capacity to meet competition from DBS and potential 70 to 80 compressed digital channels available through DIRECTV. Kagan interpreted a sample of cable operators to indicate a shift of nearly 3 million subscribers to a higher bandwidth by year end. [*See* N0011247 (DAE VOL. VII.R, EXH. 447).] A table of MSO planned upgrades catalogued by Boftz & Company in October 1994 indicated the pervasiveness of upgrade plans. The table below restates the numbers cataloged in the report by Bortz and Company.

Upgrade/Rebuild Plans

MSO (1)	Target Date to Complete Rebuild (2)	Subscriber Base Affected (3)	To What Level? (4)
Time Warner	Year-end 1998	95%	750 MHz
Continental	Year-end 1997	100%	550 or 750 MHz
Comcast	Mid-year 2000	100%	750 MHz
Cablevision Systems	Mid-year 1996	50%	750 MHz
Cox Cable	Year-end 1996	75%	750 MHz
MetroVision	Year-end 1995	75-80%	750 MHz
Adelphia	Year-end 1999	100%	750 MHz
Times Mirror	Year-end 1999	75-80%	750 MHz
Viacom	Year-end 1966	75%	750 MHz
Colony	Year-end 1999	100%	550 or 750 MHz

Source: Bortz & Company survey results, prepared for The Travel Channel, (DAE VOL. VII.R, EXH. 160).

As a guide to interpreting these numbers, a 550 MHz system has a capacity of approximately 80 analog channels, a 750 MHz system has a capacity of approximately 110 analog channels and a 1,000 GHz system has a capacity of approximately 160 analog channels.

11. These survey results are confirmed by the plans of the cable companies. For example, Time-Warner's Plant Upgrade Guidelines for the 1995 budget year states that a forward bandwidth of 750 MHz is typical and should support 79 analog channels and 33 digital channels. [TWD00010285-00010286 (DAE VOL. VII.R, EXH. 448) (RESTRICTED).] Similarly, cable MSO Cablevision states "In conjunction with its fiber optic construction program, Cablevision is also upgrading its existing coaxial cable television plant to increase channel capacity for the delivery of additional programming and new services. All of the Company's cable television systems haven [*sic*] minimum capacity of 35 channels and 70% of them are currently offering at least 52 channels to subscribers. As a result of the upgrades, it is anticipated than [*sic*] by 1995 virtually all Cablevision subscribers will be sewed [*sic*] by cable television systems having a capacity of at least 52 channels and most will be capable of offering 77 channels." [*See* Cablevision WWW site on May 23, 1995 http//moon.cablevision.com/cvchtml.txt]

12. Digital compression is expected to be installed by the cable industry in significant quantity later this year or early next year. The cable industry has already made significant investments in compression technology. For example, TCI, our nation's largest cable system operator, makes the following statement in its latest SEC Form 10K filed March 31, 1995.

> Compressed digital video technology converts as many as ten analog signals (now used to transmit video and voice) into a digital format and compresses such signals (which is accomplished primarily by eliminating the redundancies in television imagery) into the space normally occupied by one analog signals. The digitally compressed signal will be uplinked to a satellite, which will send the signal back down to a customer's satellite dish or to a cable system's headend to be distributed, via optical fibar

> and coaxial cable, to the customers home. At the home, a set-top video terminal will convert the digital signal back into analog channels that can be viewed on a normal television set. The Company intends to begin offering such technology to its cable subscribers as the set-top terminals become available for distribution. The Company has established the National Digital Television Center in Denver during 1994 to compress, uplink, encrypt and authorize reception of digital television signals as well as provide digital television and multimedia production services. Through March 1995, the Center has established long term contracts to provide services to a dozen content providers, digitally compressing and distrbuting more than 100 channels of programming.

On May 10 of this year, *Communications Daily* reported Hewlett-Packard's announcement that it had received 350,000 more orders for its digital set-top. (A 100,000 unit order from Cox and an additional 250,000 from TCI.) (DAE VOL. VII.R, EXH. 429) It appears indisputable that the cable industry is moving toward the roll-out of compressed digital services.

13. Those who follow the cable industry were, in 1992, well aware of these technological developments. Bandwidth expansion and the advent of digital compression could be foreseen for many years. For example, a 1983 textbook, *Cable Communication* by Thomas F. Baldwin (DAE VOL. VII.R, EXH. 432), Prentice Hall, 1983, stated that "an increase from 400 to 500 MHz would add 17 more channels at a nominal increase in system cost." That book also discussed compression and observed that three to one compression would permit a 400 MHz system to carry 150 channels. In 1992, hardware vendors were already actively promoting their digital advertisement (unnumbered insert), *Cablevision*, March 23, 1992 and Scientific-Atlanta advertisement (unnumbered insert), *Multichannel News*, November 30, 1992

compression systems in the trade press. [*See* Magnavox (DAE VOL. VII.R, EXH. 433).] The evaluation and selection process for digital compression standard were well underway by mid-1992. CableLabs planned to test and choose a digital compression delivery system by year's end, and HBO and PrimeStar Partners held competitions to determine their own digital compression systems. [*See* "Standards? What Standards?," *Cablevision*, May, 4 1992 (DAE VOL. VII.R, EXH. 434), pp. 66-68.] CableLabs, the research and development consortium of cable television system operators, predicted the transformation of cable systems to hybrid analog-digital systems beginning in about 1994. [*See* "SPECS News from CableLabs," October 1992 (DAE VOL. VII.R, EXH. 435), p. 1.] While discord on an industry standard for compression had threatened to delay the technology, 1992 brought convergence between the industry's compression efforts and the emerging world standard for coded bitstream and decoder requirements known as MPEG (Motion Picture Experts Group). Late in 1992, General Instrument Corp. announced expansion of capacity of its digital-compression system by over 60 percent, yielding between 7-16 video channels per standard analog channel over satellite and cable links. [*See* GI: We Have 16:1 Compression Ratios," *Multichannel News*, October 19, 1992 (DAE VOL. VII.R, EXH. 436), p. 2.] Viacom Inc. announced its selection of the Scientific-Atlanta compression system for delivery of Showtime Networks Inc. and MTV Networks units to hotel and private cable markets by first quarter 1993, and digital delivery to cable TV headends by second or third quarter of 1993. [*See* "Viacom Taps S-A's Open Compression," *Multichannel News*, November 16, 1992 (DAE VOL. VII.R, EXH. 437), p. 1.] Discovery Communications Inc. created the "Your Choice TV" remote control ordering system to simplify consumers' efforts to choose programming. [*See* "Discovery Debuts Remote for 500-Channel Universe," *Multichannel News*, December 14, 1992 (DAE VOL. VII.R, EXH. 438), p. 1.]

14. By 1992, improvements in cable electronics were permitting capacity upgrades toward 1 GHz of capacity of analog capacity. Because digital compression could be counted on to expand capacity roughly six-fold, an upgrade to a 1 GHz system carrying only gidital signals would yield a capacity of 1000 channels. In 1992, Time Warner Cable had already upgraded part of its Queens, N.Y. cable system to 1 GHz, carrying 150 channels. [*See* "The steps to 150+ channels with 1 GHz," *Communications Technology*, September 1992 (DAE VOL. VII.R, EXH. 439), p. 46.] Viacom was rebuilding part of its system in Castro Valley, California to 1 GHz for marketing testing, and designing the rest to accommodate easily a future upgrade to 1 GHz. [*Ibid.*] Time Warner's Rochester, N.Y. system, Adelphia systems, and Rogers systems in Canada were all being designed with capability to upgrade to 1 GHz. [*Ibid.*] Cable hardware vendors actively encouraged cable providers to upgrade systems to 1 GHz. [Viewsonics Inc. advertisement (insert), *Communications Technology*, December 1992 and Regal Technologies Ltd. advertisement (insert), *Communications Technology*, December 1992 (DAE VOL.;; VII.R, EXH. 440).]

15. Again, by 1992, many cable companies had begun to integrate fiber into their systems. As cable focused less on expanding into new neighborhoods and more on better programming and cable service, upgrades presented the opportunity to incorporate fiber optic transmission technology. Despite the advent of the 1992 Cable Act, cable operators planned significant increases in fiber and amplifier purchases. [*See* "Operators' '93 Plans: The Buck Stops Here," *Multichannel News*, November 30, 1992 (DAE VOL. VII.R, EXH. 441), p. 3.] Suppliers and operators claimed declining fiber costs now made installing fiber-to-the-feeder less expensive than installing a straight 500 MHz coaxial build. Cable operators were laying excess fiber in anticipation of future services like personal communications network, telephony or video-

on-demand. [*Ibid.*] By early 1992, Continental Cablevision had already embarked on a $7 million consolidation and fiber upgrade of cable plant in southern New Hampshire. [*See* "Fiber optics: Shaping cable's future," *Communications Technology*, March 1992 (DAE VOL. VII.R, EXH. 442), p. 26.] In 1992, Cox Cable expanded the number of systems targeted for fiber-to-the-service-area (FSA) upgrades to 17. Such companies reportedly saw movement toward 500-MHz FSA as a transition point for MSOs who anticipated need for more than 78 channels before digital compresison were viable. [*See* "Cox Moves More Aggressively on Fiber Optics," *Multichannel News*, June 22, 1992 (DAE VOL. VII.R, EXH. 443), p. 29.] Vendors promoted fiber system facilities and demonstrations. [*See* Harmonic *Lightwaves* Advertisement (Insert), *Communications Technology*, December 1992 (DAE VOL. VII.R, EXH. 444.)]

16. In 1992, a poll of the cable industry showed that nearly half of the respondents expected that their rebuild/upgrade plans would result in an increase in the system bandwidth (and thus in system channel capacity). [*See* "Building Blocks," *Cablevision*, September 21, 1992 (DAE VOL. VII.R, EXH. 445), p. 44.] In 1992, CEO Thayer Bigelow of Time Warner Cable Programming anticipated that as many as 90 percent of the roughly 75 percent of the cable industry with 35 to 40 channels would be upgraded to 550 MHz (78 channels) by 1997. [*See* TWS00141149 (DAE VOL. VII.R, EXH. 157) (RESTRICTED).] High cable equipment manufacturer stock performance in 1992 was partly attributable to increasing fiber-optic upgrades and developments in digital compression technology. [*See* "Cable Upgrades Boost Supplier Fortunes," *Broadcasting*, December 14, 1992 (DAE VOL. VII.R, EXH. 446), p. 51.]

17. These views of the future of cable channel capacity were not only well known in the industry, they were communicated to the Congress by credible speakers. For

example, FCC Chairman Sikes testified before Congress in 1992 that the cable industry was aggressively investing in fiber and digital technologies. [*See* S. Hrg. 102-672: Cable-Instructional TV and S. 1200 Communications Competitiveness and Infrastructure Modernization Act of 1991 (CR VOL. I.K, EXH. 19), at 49).] Tom Gillet (former vice-president of CableLabs, later consultant to and spokesman for the cable industry) testified in the same proceeding stating "On the cable television fiber/coaxial hybrid there will also be many enhancements. Capacity is growing to 1 gigahertz, digital transport is being added, two-way capabilities are expanding and compression will soon be deployed." [*Ibid.* at 72] Phil Verveer, Counsel for National Cable Television Association, presented testimony that all 20 of the largest MSOs had begun installation of fiber within their systems, that fiber installed by these companies had increased 400 percent since 1988. and that cable industry fiber deployment was predicted to grow at an annual rate of 25 percent over the subsequent decade. [*Ibid.*] In that testimony, Mr. Verveer, the cable industry, witness, twice refers to current cable systems as having capacity of more than 150 channels. "The existing coaxial cable to every home is theoretically capable of carrying 160-170 channels of sandard, 6-MHz NTSC television." [*Ibid.* at 122.] "By combining fiber optic trunking and feeder applications with the coaxial cable currently running from the curb into the home (and which can carry more than 150 video channels) cable systems need not rip out and replace their enitre networks in order to bring consumers the benefits of fiber." [*Ibid.* at 136.] In this example, Mr. Verveer appears to be speaking of the capacity of the cable itself. His fundamental point is that the capacity of a cable system can be expanded by installing fiber and new electronics but reusing the existing cable plant. No witness contradicted these correct assertions by these witnesses about the current and likely future state of cable technology. Cable television technology and the imple-

mentation of that technology has progressed, as shown by my discussion above in paragraphs 4 to 12, along the lines anticipated in 1992.

18. Further in the future, I expect more fundamental changes. Traditionally, cable systems were like broadcasting—the same bundle of signals went to every household and the TV set (or the set-top converter) picked off the specific signal a consumer wanted. Another approach is to dedicate a few channels to each household, and then route onto those channels the programming requested at that house. In essence the cable system would become more like a telephone system or a computer network. The viewer could dial-up the program he or she wished to watch. The limitation on the number of program services a consumer could choose among would be created by the number of program services available at the cable system's switching point, not by the capacity of the cable plant to the household. Such a switched architecture would be quite similar to the telephone network which lets users dial calls to millions of destinations—although it permits talking on only one call at a time. The combination of high capacity on the cable, small serving areas fed by cable, and switching capabilities at the headend, yields a network design that can support a virtually unlimited number of channels. Consequently, the long-run vision for cable is not a world of 500 or 1,000 channels, but rather a world where the consumer can pick from a menu of tens of thousands or millions of program choices. The limitation on program services will not be the size of the highway to the home—rather the limitation will be the supply of programming.

19. The driving forces for most of these improvements in cable do not raise from inside the cable industry itself. Rather, the cable industry offers just one more market for improvements in communications technologies. The growth in cable capacity comes from the same roots that drive the growth in the capacity of modern personal com-

puters, of the Internet, and of services such as Direct TV's digital home satellite service. Almost everyone has, by now, seen an advertisement on network television with "Frank Fontana" touting the merits of compressed digital television. Any one who has regulary used a computer for word processing over the last decade is aware of the vast increases in the capabilities of those systems. The Internet has moved from being a research tool for the computer science community to a tool of everday commorce. The same technologies—improved electronics and fiber optics—that lie at the heart of these now familiar advances will expand the capacity of cable television systems manyfold.

May 25, 1995

/s/ Charles L. Jackson
CHARLES L. JACKSON

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

AFFIDAVITS IN SUPPORT OF TIME WARNER ENTERTAINMENT COMPANY, L.P.'S MOTION FOR SUMMARY JUDGMENT

* * * *

May 26, 1995

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

AFFIDAVIT OF DAVID KINLEY

DAVID KINLEY, being duly sworn, deposes and says:

1. I am President of Sun Country Cable, Inc. and Sun West Cable, Inc. (d/b/a Sun Country Cable, "Sun"). I have been President of the Company since its formation in 1986.

2. I am also Chairman of the Small Cable Business Association ("SCBA"). I was elected Chairman of the SCBA in May, 1993. SCBA is a trade association with 370 member companies serving over 2 million subscribers. The average member system has about 1,000 subscribers and 30-35 channels. I submit this Affidavit in support of Plaintiff's Motion for Summary Judgment.

3. An affidavit has previously been submitted for this litigation on February 12, 1993 by Lynette J. Simpson on behalf of Sun. I hereby incorporate by reference the contents thereof.

4. Sun is composed of 16 systems with an average of 611 subscribers per system. Thirteen of our systems have 35 channels. Two systems have 12 channels and one system has 60 channels. We currently have plans to rebuild one of our 35 channel systems to 550 MHz. We have no plans to expand our other systems. None of our systems have unused activated channel-space.

5. Our systems are typical of small independent cable systems. Unused activated channels are extremely rare. Large scale expansion plans are uncommon. The cost of increasing capacity is fixed—it costs the same amount

regardless of the number of subscribers. Since the average small cable operator has less than 1000 subscribers, the cost of expanding is prohibitive when examined on a dollars-per-subscriber level.

6. Since the last affidavit was filed, Sun has suffered significant injury because of must-carry. The Los Altos Hills system has been forced to add the following signals to its line-up: KMTP, KCNS, KFBC, KLXV and KFTY. Yet another station, KBI-TV, has recently demanded carriage pursuant to must-carry. We had never received a written or verbal request for any of these stations from any subscriber. In fact, since they have been added they have generated complaints. The must-carry stations include a second Asian language station (the system already carried Asian language programming from San Francisco) and 2 religious programming networks.

7. The Tuolomne system, which has 31 channels and approximately 1700 subscribers, has been forced to add KCSO (a Spanish language channel) and KSCH (a station with a religious format) to its system. Neither of these stations was ever requested by a customer. Because the system did not have enough unactivated capacity to add 2 channels, it had to drop KTVU, an independent broadcaster outside of the ADI, to comply with must-carry requirements. KTVU was the only station on the system carrying news from the San Francisco area. Because many subscribers are people who live in the Bay area and weekend in Tuolomne, dropping KTVU caused a great deal of customer dissatisfaction.

8. Our customers have requested numerous programming services, including American Movie Classics, Turner Classic Movies, the Sci-Fi Channel and the Cartoon Network. Limited channel capacity and budget constraints make it impossible to meet all such customer requests. Being forced to add must-carry stations has made it even more difficult to satisfy any customer demands. Our

budget allows us to add only one or two signals each year. Because of must-carry, not only is our scarce spectrum taken up by unwanted channels, but also the costs of adding the stations wreak havoc on our capital expenditure budget.

9. Adding each station caused us to incur approximately $2,000 in capital costs to rearrange or activate the channels. We have had to buy equipment for the headend to enable the changes to be made. Furthermore, under FCC rules and frequently under local franchise provisions, we must notify subscribers of changes in signal carriage and channel position assignments. Additional costs have been incurred providing subscribers with explanatory materials and revised channel line-up cards. We would have preferred to spend the capital in more effective ways, such as on programming or equipment upgrades.

10. Must-carry requirements impose incalculable costs in loss of business goodwill. Customers blame changes on the cable system and drop service rather than learn new channel alignments. This is true particularly when, as in Tuolomne County, programming is deleted. Such a loss of goodwill is devastating, particularly for a system with few subscribers.

11. Most of our revenues are derived from subscriber fees. Advertising accounts for only a negligible amount of our revenues. Only 2 of Sun's systems have advertising at all. The minimal amount of advertising we do have is produced on a character generator. Advertising accounts for a mere .1% of our revenues. Clearly our programming decisions are unaffected by potential advertising revenue.

12. We do not have the technology to insert ads on cable programming nor do we have plans to buy equipment that would enable us to do so. Cable advertising equipment requires expenditures of at least $10,000-$20,000 per headend. In addition it is very complicated

to install and operate. The logistics of creating, running and selling ads make advertising a very unappealing investment for small operators. Even leaving aside the cost and difficulty of selling ads, advertising would be far more costly than any revenues it could generate. Digital insertion technology is not feasible for us.

13. As chairman of the SCBA, I am aware of very few small operators who have the availability to insert ads into cable programming. It is my experience that for the reasons discussed above, most small systems do not have plans to obtain analog tape equipment to enable them to do so. Even the very few small operators that do have analog tape do not heavily rely on advertising for revenues. Advertising accounts for at most only 1-2% of their revenues.

14. Small cable operators, including Sun, are increasingly feeling the effects of RCA/Hughes dishes and other forms of satellite transmission as competition. Must-carry has limited small cable operators' ability to offer the wide variety of cable programming which subscribers demand. Subscribers have increasingly turned to alternative sources to receive more cable programming. Competition from MMDS has been of particular concern to Sun Country.

15. The retransmission consent provisions of the Cable Act have also been a source of concern for small cable operators. The small operator has no leverage against major broadcasters who have elected retransmission consent. Customer demand requires operators to carry the major broadcasters. Broadcasters are fully aware of their leverage so they elect retransmission consent and exploit the weak position of the small operator. This depletes the systems' operating budget and eliminates funds that could be used for programming or expansion.

16. In sum, must-carry has deprived Sun and other small operators of their channel space without compensation. It has forced us to incur costs to rearrange line-ups and add channels to carry stations of dubious quality. For the most part these costs can scarcely be afforded by a small operator. This has had a deleterious effect not only on the financial health of the systems, but also on their ability to offer attractive line-ups. This makes it harder to compete against other forms of satellite transmission. Small operators, who themselves are often struggling to survive, have been forced to subsidize local broadcasters without any corresponding benefit to their own business or their subscribers.

May 25, 1995

/s/ David Kinley
DAVID KINLEY

[Jurat Omitted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

MEMORANDUM OF NATIONAL CABLE TELEVISION ASSOCIATION, INC. IN SUPPORT OF PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

* * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

DECLARATION OF GREGORY L. KLEIN

DISTRICT OF COLUMBIA ss:

GREGORY L. KLEIN makes this declaration and states:

1. Since January 1986, I have held the position of Director of Economic Analysis at the National Cable Television Association, Inc. ("NCTA"). I submit this declaration in support of plaintiff National Cable Television Association, Inc.'s Motion for Summary Judgment in Civil Action No. 92-2495.

2. I hold a Masters degree in Engineering Economics from Indiana State University in Terre Haute, Indiana and a Masters degree in Economics from Boston College in Chestnut Hill, Massachusetts. I am responsible for collecting, tabulating, and analyzing information that bears on NCTA's positions before Congress and the Federal Communications Commission. I have testified as an expert witness before the Copyright Royalty Tribunal. I have also submitted numerous affidavits on behalf of the Association.

3. The information contained in this declaration is based on personal knowledge as well as on information found in reports and other professional publications that are generally relied on by experts in the field of cable programming and operations.

4. My declaration primarily discusses the following topics: the constraints on cable channel capacity and the

costs of adding new channels (¶¶ 6-12, 41-43); the increases both in cable subscribership and in the number of broadcast stations over the same period (¶¶ 14, 17, 18); and the current and projected estimates for local advertising revenues for cable systems (¶¶ 32-33). In addition, my declaration demonstrates that the burdens imposed by the must carry rules on operators and programmers exceed those imposed under the must carry rules struck down by the Court of Appeals in the *Century* decision (¶¶ 19-27), and that these burdens can be expected to increase due to changes in the Copyright Act and Federal Communications Commission actions with respect to ADI modifications (¶¶ 28-31). My declaration also demonstrates the limitations of the data relied upon by defendants' experts to demonstrate cable system local signal carriage (¶¶ 34-40). Finally, my declaration explains that virtually all broadcast stations that chose retransmission consent reached carriage agreements with cable operators (¶¶ 44-45).

5. NCTA is the principal trade association of the cable television industry in the United States. NCTA represents owners and operators of cable systems serving most of the nation's 61 million cable households, as well as more than 100 national and regional cable programming networks.

6. Television signals are electromagnetic impulses that are transmitted to viewers' television receivers, where they are translated to produce video images and sound. The primary difference between broadcast technology and cable technology is the medium through which these electromagnetic impulses travel. Broadcast transmissions travel through the air in various frequencies, with the sum of all available frequencies being the frequency "spectrum." This spectrum is physically limited, and can bear only a certain number of television signals. Cable television, by contrast, transmits electromagnetic impulses to viewers through metal wires such as coaxial cable,

with different signals traveling at different frequencies inside the cable. In effect, the cable acts as a self-contained electromagnetic spectrum; this allows cable television operators to transmit signals without regard to the specific spectrum limitations that govern broadcast television. As I explain below, however, the carriage capacity of cable television is limited.

7. The number of programming sources available to cable television operators has risen sharply as the number of subscribers to cable service has increased. In 1976, there were 4 national cable programming networks. Currently, 128 national and 40 regional cable networks offer programming and approximately 43 more networks are planned. Cable programming not available through broadcast television includes satellite-delivered networks specializing in quality children's programming, black entertainment programming, artistic programming, science and nature documentaries, sports, news, and public affairs, including coverage of the United States Congress.

8. All cable television systems have a defined channel capacity. As of October 1, 1994, 86 percent of all U.S. systems for which capacity data was available had a maximum capacity of less than 54 channels. Twenty-two percent had a capacity of less than 30 channels. I am aware of less than half a dozen cable systems in the United States that have channel capacities in excess of 128 channels (equal to the number of national networks).

9. As the principal trade association for the cable television industry, we know that available channel capacity is highly constrained in our industry. Our understanding is consistent with the results in the Arthur D. Little study entitled *Availability of Channels in U.S. Cable TV Systems.*

10. Upgrading or rebuilding cable systems to increase channel capacity requires large capital investments—

generally in the millions of dollars for any particular local system. Paul Kagan Associates, Inc. estimates that the cable television industry spent $1.12 billion on rebuilding cable systems in 1994, at an average cost of $26,000 per mile. Another $746 million was spent on upgrading cable systems, at an average cost of $9,400 per mile. These costs are not expected to fall; rather, Paul Kagan Associates predicts that the average cost of rebuilding a cable system will increase to $29,000 per mile by the year 2000, while the average cost of upgrading a system will rise to $11,600 per mile. Although emerging technologies such as video compression may provide new ways of expanding capacity, these technologies, too, promise to be expensive. Paul Kagan Associates estimates that delivery of digital converters (an important component in the deployment of digital technology) will be delayed until 1996 and the cost per converter will be around the $600 level.

11. Considering existing channel capacity and the cost of adding new channels, as well as the continuing development of new sources of programming, it is clear that, for the foreseeable future, the supply of programming available to cable television operators will exceed the carriage capacity of all but a handful of local cable systems.

12. In the future, emerging technologies such as high definition television (HDTV) and interactive programming, as well as innovative services like the presentation of films at staggered starting times on different channels, will compete with traditional sources of programming for available channel capacity.

13. In the course of my work at NCTA, I have had occasion to review most if not all publicly available research regarding carriage of local broadcast television signals by cable television operators. The most comprehensive study of the incidence of broadcast signal carriage was conducted by NCTA and Price Waterhouse

during the summer of 1988. This investigation showed that the 3,966 responding cable television systems were carrying 98 percent of all broadcast stations that would have qualified for a carriage preference under the interim must-carry rules invalidated in *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987). Ninety-four percent of these systems reported carrying all stations qualified for must-carry status under the interim rules, and an additional 3 percent carried enough qualified stations to satisfy their carriage obligations under the rules struck down in the *Century* decision.

14. According to the FCC, the number of operational, full power commercial broadcast television stations in the United States rose from 915 in July 1985 to 1,147 in December 1992 to an all-time high of 1,167 in April 1995. The number of operational, non-commercial educational broadcast television stations in the United States rose from 299 in July 1985 to 362 in December 1992 to 364 in April 1995, a 22 percent increase. As with commercial stations, more educational television stations than ever before were broadcasting in 1995. During this same time period, there was a dramatic growth in the number of low power television stations. In July 1985, the FCC reported 343 operational LPTV stations. By December 1992, there were 1,310 LPTV stations and by April 1995, there were 1,623 LPTV stations operational.

15. Throughout the 1985-1992 period, according to data provided by Cable Data Corporation ("CDC"), those cable systems that are required to report their local signal carriage on average carried over 7 local stations. Precise estimates for any given period are subject to change due to the changing nature of the CDC data, even for historical time periods.

16. Cable television serves about 64 percent of all U.S. households with television. Competing technologies (such as MMDS, SMATV, DBS, and TVRO) provide

service to approximately 5 percent of television homes, while 31 percent of all television households receive *only* over-the-air broadcast service. In fact, DBS (direct broadcast satellite), a service using high-powered satellites to distribute programming received on an 18 inch dish, already offers significant competition to the cable industry. Although launched less than two years ago, analysts have noted that DBS will have approximately 2.2 million subscribers by year end and is projected to have over 5 million subscribers by the year 2000. (See Paul Kagan Associates, Inc., *Cable TV Investor*, May 18, 1994, p. 4.) Indeed at the end of 1994, two of the major companies involved in DBS (USSB and DirecTV) reporting adding 2,000 subscribers per day. (See *The Atlanta Journal and Constitution*, November 6, 1994.)

17. Public broadcasting stations have claimed a relatively constant share of all television viewing over the last 8 years: they recorded a 4 share during the 1993/1994 season, up slightly from a 3 share during the 1985/1986 season. Independent stations have experienced an increase during the same period and currently record a 21 share, up from a 15 share during the 1985/1986 season. The top 3 commercial broadcast networks experienced a decline in their share of viewing from a 66 share during the 1985/86 season to a 52 share during the 1993/94 season, but they remain the most-watched programming on television. Combined, broadcast television accounted for more than 70 percent of all television viewing during the 1993/94 season.

18. In 1980, 55 percent of homes passed by cable television actually subscribed and cable penetration was 22.6 percent of television households. Today, cable passes over 95 percent of television households and sixty-four percent of homes passed by cable currently subscribe.

19. The must carry requirements in the 1992 Cable Act are significantly broader than the regulations adopted

by the FCC in 1987. In order to assess the effects those differences might be having on the extent of the impact of must carry on cable operators and cable programmers, I conducted the analysis described in paragraphs 21-26 below.

20. The recent Arthur D. Little study of carriage of must carry stations indicates that, by December 1994, roughly 30 percent of cable systems added television stations in compliance with the latest set of must carry rules. See Declaration of Peter Shapiro, Exhibit 2. Cable systems required to add stations serve more than 50 percent of the nation's cable subscribers.

21. I conducted an analysis of the 270 instances of broadcast television stations identified in the Arthur D. Little "Carriage of Must-Carry TV Broadcast Stations" report as being *added* by cable systems in the Arthur D. Little sample to comply with the must carry rules. The purpose of my analysis was to determine the extent to which broadcast television stations added pursuant to the most recent set of mandatory carriage requirements would have "qualified" as must carry stations under the interim rules adopted by the FCC in 1987 as a result of the Joint Industry Compromise that included defendants NAB and INTV and which were struck down by the Court of Appeals for the District of Columbia Circuit in the *Century* decision.

22. The *Century* rules differ greatly from the current mandatory carriage rules. The *Century* rules more narrowly defined what constituted a "must carry" station. Under the *Century* rules, a commercial television station could qualify for mandatory carriage only if the cable system was within a 50 mile zone of the station *and* the station satisfied a minimum viewership test of a 2 percent share and 5 percent CUME (net weekly circulation) in noncable households in the county in which the cable system is located (stations in operation for less than one year were exempt from the viewing test) *and* the station

would not be a distant signal for copyright purposes. This compares to the current rules that grant stations must carry rights throughout their Area of Dominant Influence ("ADI") and impose no viewership test. Moreover, the *Century* rules limited the number of qualified commercial and non-commercial must carry stations which a system was required to carry to 25% of usable activated channels, in contrast to the current rules' requirement to devote up to one-third of a system's channel capacity to carriage of commercial television stations (and to add noncommercial stations on top of that).

23. Likewise, the *Century* rules limited the number of noncommercial stations that a cable system was required to carry. Systems with less than 54 activated channels were only required to carry one local noncommercial station and systems with at least 54 activated stations were required to carry two noncommercial stations. By comparison, the current rules do not limit the number of local noncommercial stations which systems are required to carry if they have in excess of 36 channels.

24. Based on my analysis, I have determined that only 37 instances, or 14%, in the ADL sample involved stations that would have been required to be added as must carry signals if the Congress had reinstated the *Century* rules, rather than using the expanded set of "must carry" requirements.

25. The remaining 232 instances, or 86%, involve situations where, based on available data, the operators would not have had to add stations under the *Century* rules. Forty-eight of these 232 instances involve commercial stations that fail to meet the mileage criteria of the *Century* rules. The addition of the station in 18 other instances would not have been required because it would have forced carriage to exceed the percentage of activated channels which cable systems were required to devote to carriage of qualified must carry stations. An additional 43 instances involve the carriage of non-commercial stations added in excess of the maximum number of non-commercial stations required under the *Century* rules. Moreover, 116 instances involved stations which, based on Nielsen DMA viewing data from November 1994, appear to fail to meet the minimum viewership test included in the *Century* rules. The November 1994 data reflects viewing nearly 18 months after the effective date of the must carry rules. *See* Attachment A for a description of methodology used for this analysis. The remaining instances involve low power stations and stations which were "distant" signals for copyright purposes, neither of which had carriage rights under the *Century* rules. In one instance, the data was questionable and so I excluded it from my analysis.

26. In sum, my analysis indicates that the vast majority of the new burden of carrying additional broadcast stations imposed by the must carry statute on the representative sample of cable operators in the ADL sample was caused by the differences between the statute and the *Century* rules.

27. These results are not surprising. The use of a station's ADI to determine whether the station is a "local" station for must carry purposes is inherently problematic. Many ADIs extend well beyond the Grade B contours of most stations in a market. (The Grade B contour is a standard measurement of signal strength such that the station's signal is "viewable" over-the-air.) The Boston ADI, for example, contains counties in New Hampshire and Vermont which are far outside the terrestrial reach of the Boston television stations. The New York ADI, as another example, covers areas of 29 counties in four states, for a total square mileage of 10,957. In other cases, stations located on the edge of an ADI may be closer to cable systems located in adjoining ADIs than to systems located in areas of the station's ADI.

28. Indeed, it is my understanding that some broadcast stations have begun to demand carriage by cable

systems located far beyond where the stations are viewable over the air through arranging to transport their stations' signals by wire to distant cable headends. In the New York ADI, for example, I am aware of numerous broadcast stations proposing to use fiber to reach cable systems located far beyond the reach of their signals off-air. WLIG, an independent station licensed in Riverhead, NY (in the eastern part of Long Island) is demanding carriage via fiber on a cable system located in Jersey City, New Jersey, approximately 75 miles away, even though WLIG's Grade B contour does not even reach New York City. Likewise, WTZA, an independent station licensed in Kingston, NY, is demanding carriage of its fiber-delivered signal on cable systems operating in Ocean County, NJ, over 125 miles away, and Monmouth County, New Jersey, over 100 miles from the station.

29. The Federal Communications Commission (FCC) has recently granted numerous petitions by television broadcasters for modification of their ADI's. These broadcasters have claimed that they should be entitled to mandatory carriage not only in their ADI, but also on cable systems located in communities *outside* their ADI. The FCC's actions increase cable operators' must carry obligations by requiring them to carry stations from outside the ADI in addition to those stations within whose ADI the system is located. For example, WTXX, an independent station licensed to serve Waterbury, CT (part of the Hartford-New Haven ADI) was granted a market modification which gave the station carriage rights on cable systems located in Fairfield County, CT. Fairfield County is part of the New York ADI and the systems which serve this county already have substantial must carry burdens placed by the 22 television stations located within the New York ADI. Nearly a dozen market modifications have been granted by the FCC within the last three months. Roughly 60 additional broadcast station requests for expansion of their market into neighboring ADIs are pending before the FCC as of May 23, 1995.

30. The Satellite Home Viewer Act of 1994, P.L. 103-369, which took effect during the second copyright accounting period for 1994, also has caused an increase in the number of commercial television stations to demand must carry rights. Specifically, Congress in the Satellite Home Viewer Act changed the definition of what constitutes the "local service area" of a television station for purposes of determining cable operators' copyright liability. (Cable operators generally pay copyright royalties only for carriage of "distant" television stations outside their "local service area".) The Copyright Act definition affects must carry rights because under the 1992 Cable Act, a commercial television station is "qualified" for must carry only if it agrees to indemnify the cable operator for any increased copyright liability an operator would face on account of carriage of that "distant" station.

31. A station was "local" or "distant" under the Copyright Act prior to the 1994 amendments based on whether it would have been entitled to must carry status under the FCC's rules in effect on April 15, 1976. Under those rules, a station was generally considered "local" if it was located within 35 miles of the cable system or if it was "significantly viewed" in (or in some cases, if its Grade B contour covered) the cable community. When the 1992 Cable Act must carry rules went into effect, therefore, a station located on the tip of Long Island would not have been considered a "local signal" for copyright purposes on a cable system located 75 miles away in New Jersey, and instead the station would have had to agree to pay the New Jersey operator an amount that could have reached 3.75% of the operator's gross revenues in order to "qualify" for carriage under the must carry rules. But the 1994 amendments changed the copyright law so that a station now will also be considered "local" if a cable system is within its ADI. 17 U.S.C. § 111(f) (referencing 47 C.F.R. § 76.55(e) definition of television market). Under the new copyright definition of "local service area",

then, no copyright liability will arise from carrying a commercial television station within its ADI. As a consequence, more commercial broadcast stations may now assert must carry rights because they no longer will need to pay for the operator's increased copyright liability.

32. Cable systems primarily generate revenue through subscription fees. However, some small portion of revenue is generated by the sale of local/spot advertising on cable network programming by cable system operators. Paul Kagan Associates Inc. estimates that local/spot advertising revenue accounted for only $1.256 billion, or approximately five percent of total system revenues of $23.012 billion in 1994.

33. Moreover, Paul Kagan projects that by 2003, local advertising will still only account for five percent of total cable system revenues ($3.161 billion of $61.7 billion in total system revenue).

34. In reviewing the expert testimonies submitted by defendants, much of their conclusions are based on analyses of copyright data compiled by Cable Data Corporation (CDC). For example, Mr. Tom Meek, in his report, states that he has "found Cable Data's information to have a high level of accuracy and reliability, and is commonly relied upon by the broadcast and cable industries." I have on many occasions examined the CDC database in the course of my work. The CDC data, however, suffers from several limitations that make it an inappropriate vehicle on which to base an accurate must carry analysis. For that reason, the CDC data was only one of multiple sources of data used in my analysis described in ¶¶ 21-26.

35. The CDC data is based on the semi-annual filings made by cable operators with the U.S. Copyright Office. Only the largest cable ssytems (approximately 2,266 systems, or 17 percent, of the 12,831 systems included in the CDC database) are required to indicate on their copyright forms whether broadcast stations carried are local or distant for copyright purposes. The remaining 10,565 systems, or 83 percent, are required only to list the broadcast television stations carried, and do not identify which stations are local or distant.

36. The primary purpose of the CDC data is to ensure that cable television systems are accurately calculating the amount of copyright royalties paid to the Copyright Office for distribution to owners of copyrighted works contained in distant broadcast stations that are retransmitted by cable systems. Under the copyright compulsory license established by Congress, only copyright owners of works transmitted outside their local service area are entitled to payment from the royalties cable operators submit to the Copyright Office. 17 U.S.C. § 111(d)(3). The CDC data, therefore, was designed primarily as a tool for copyright owners to obtain accurate information about *distant* signal carriage. There is no impact for copyright royalty purposes at all if the list of local stations on the forms submitted to the Copyright Office is accurate or if it understates or overstates the number of *local* broadcast stations carried so long as the *distant* signal carriage information is correct. Because carriage of *local* television stations does not affect a cable operator's copyright liability, use of the CDC data for making accurate analyses of local signal carriage has limited utility in this proceeding.

37. The data set has additional problems which, if not accounted for on a case by case basis, can lead to misinterpretation of the final results. For example, broadcast television stations occasionally change call signs or may go off the air and then resume operations under a different call sign. The CDC data might count this as a "drop" by a cable system when in fact the system still carries the station (under its new call sign) or if the system carries the station after it resumed operations (under the new call sign). This type of error was apparent in Mr. Meek's analyses. For example, WCOM, an independent station licensed to Mansfield, OH left the air in 1989 and re-

turned to operations under the call sign WMFD on May 30, 1992. My review of "carriage history" for WCOM included in Meek Exhibit A (dated 3/30/95) shows that Mr. Meek improperly counted that station as not receiving carriage by MultiChannel Cable of Bucyrus, OH between the first half of 1993 and the first half of 1994 when in fact the station (operating under the call sign WMFD) was carried. Moreover, Mr. Meek's "carriage history" for WMFD indicates that MultiChannel Cable failed to carry the station prior to 1993, when in fact the station was not in operation under this call sign prior to May 30, 1992 and the station *was* carried (under a different call sign) during the second half of 1992 (although improperly listed in Meek exhibit A under the carriage history for WCOM). (See Meek's Exhibit A pp. 88, 138) Therefore, Mr. Meek double-counts alleged instances of non-carriage.

38. Likewise, the CDC database contains information on low power broadcast television stations which were not granted must carry rights under the former must carry rules. By including these stations in their analysis, defendants' experts improperly overstate the extent to which broadcast stations were allegedly dropped in the absence of must carry rules. (See Meek's Exhibit B3, pp. 174-175)

39. The CDC data contains information for numerous satellite master antenna television systems ("SMATV") that are not cable systems as defincd by the FCC and which are not subject to the mandatory carriage requirements. Defendants' experts have failed to exclude all of these systems from their analyses. Indeed, Mr. Meek notes on page 2 of his report that "it is acknowledged that some SMAT's remain in the sample." My review of the Meek exhibits confirms that SMATV systems are included in his sample. On just one page alone, Meek includes, among a list of *cable systems* which have allegedly dropped stations, a Days Inn located in Spartenburg, SC, a Shilo

Inn located in Bremen, GA and four Spectradyne system located in the greater Chicago area, none of which are cable systems. (See Meek's Exhibit B3, p. 21)

40. Therefore, although the CDC data may be fairly useful for analyzing the carriage of "distant" broadcast television stations, there is no reason in light of the above facts to believe that it is reliable in addressing the issues pertaining to the mandatory carriage of broadcast television stations.

41. A cable operator incurs costs for activating channels on its system even when channel capacity is technically available. These costs may include charges for new equipment needed to obtain the signal over the air and deliver it to cable viewers, as well as additional marketing expenses.

42. For example, an operator may need to purchase and install a new antenna to pick up a broadcast signal off air and a new signal processor. Operators in addition may need to buy and install additional modulators, provide additional rack space in the system headend, reprogram computers to handle control and accounting changes, revise and expand program guides to list the new channel, provide notice to subscribers of the change in program offerings, and incur other increased marketing and operational expenses.

43. Moreover, in some systems, changes may be needed to the equipment provided to viewers in their home. Subscribers have converter boxes to receive cable service that only provide a specified number of channels. Therefore, a cable system technically may be built to a larger channel capacity than the converters can receive. New converter boxes therefore may be necessary to enable viewers to receive a newly-activated channel. In those cases, an operator would not only be forced to incur the costs previously mentioned, but also to purchase and in-

stall new converters with expanded channels to replace the existing ones in subscribers' homes.

44. According to a study by Arthur D. Little, 62 percent of local commercial broadcasters elected to negotiate for carriage under retransmission consent, rather than ensure their carriage and channel positioning rights under the must carry rules. As the principal trade association of the cable industry that closely followed this issue, NCTA is aware of virtually no situation in which a television station that elected retransmission consent was not carried by the cable system.

45. This is confirmed by my review of published reports by trade publications, the broadcasters, and the FCC, all of which demonstrated that virtually every broadcast station choosing retransmission consent ultimately reached agreement with the cable operator for carriage. For example, a study conducted by defendant NAB indicated that "91.7 percent of stations continued to reach at least 99 percent of their cable households by cable." See NAB's *CEO's Friday Memo* from Eddie Fritts, dated October 8, 1993, Bates-Stamped 4002604. Likewise, the FCC reported in November 1994 that "now that the retransmission consent provisions are in effect, there is no evidence that subscribers are being deprived of network programming." See FCC *Must Carry Reconsideration Order,* November 4, 1994, p. 61. See also Broadcasting and Cable, November 1, 1993, p. 14.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 25 of day of May, 1995.

/s/ Gregory L. Klein
GREGORY L. KLEIN

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

DECLARATION

I, John L. Peterman, declare as follows:

* * * *

[Exhibit 2]

Summary of FCC Survey Concerning Effects of the "Must-Carry" Requirements

	Response to Question Number						Percentages		
Subscriber Category	1. Channel Capacity	2. Number of Must-Carry Stations	3a. Number of Added Must-Carry Stations (Non-Commercial Educational)	3b. Number of Added Must-Carry Stations (Commercial)	4. Number of Stations that Elected Retransmission Consent	5. Open Channels	Percentage of Channel Capacity used by Must-Carry Stations	Percentage of Channel Capacity used by Added MC Stations	Percentage of Channel Capacity used by RC Stations
	(1)	(2)	(3)	(4)	(5)	(6)	(7) = (2)/(1)*100	(a_2) = (3+4)/(1)*100	(9) = (5)/(1)*100
Greater than 50,000 subscribers:									
Average	56.96	6.62	0.31	1.04	4.12	1.42	11.61	2.36	7.22
Weighted Average	56.40	7.25	0.36	1.13	4.13	1.18	12.85	2.64	7.33
Between 10,000 and 50,000 subscribers:									
Average	54.16	6.44	0.18	1.07	4.55	2.70	11.88	2.30	8.40
Weighted Average	54.99	6.58	0.17	1.06	4.58	2.50	11.97	2.23	8.33
Less than 10,000 subscribers:									
Average	33.35	3.79	0.14	0.43	3.61	4.45	11.36	1.71	10.83
Weighted Average	42.08	4.76	0.23	0.75	4.18	2.67	11.32	2.32	9.93
Total:									
Sum	20,182	2,338	78	324	1,939	1,866			
Average	40.77	4.72	0.16	0.65	3.92	3.77	11.58	1.99	9.61
Weighted Average	54.55	6.70	0.25	1.06	4.38	2.01	12.28	2.40	8.03

Total Number of Must-Carry Stations Added: 402

Total Number of Broadcast Stations: 4,277

Percentage of Stations that Elected Must-Carry: 55%

Percentage of Stations that Elected Retransmission Consent: 45%

Summary of FCC Survey Concerning Number of Carried and Added Must-Carry Stations

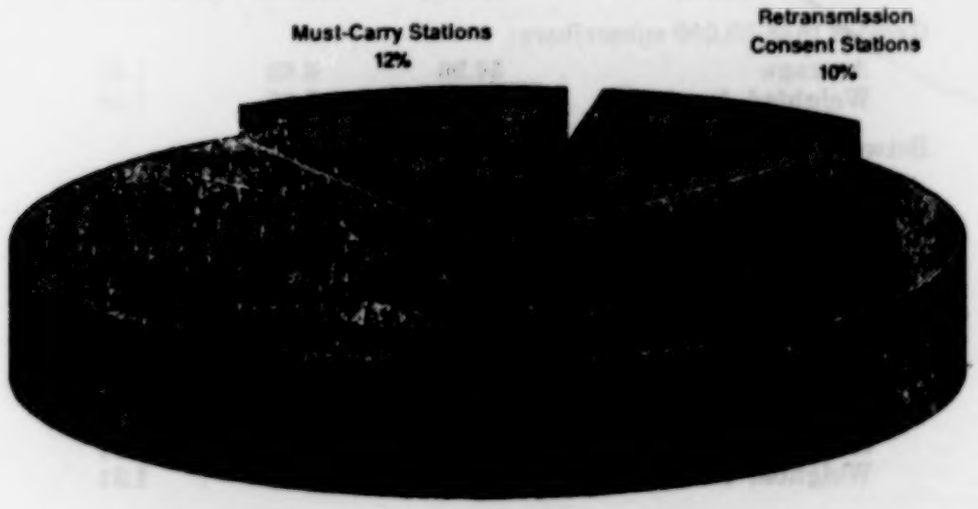
	Averages		
Subscriber Category	Channel Capacity	Number of Must-Carry Stations	Number of Added Must-Carry Stations
Greater than 50,000 subscribers:			
Average	56.96	6.62	1.35
Weighted Average	56.40	7.25	1.49
Between 10,000 and 50,000 subscribers:			
Average	54.16	6.44	1.24
Weighted Average	54.99	6.58	1.23
Less than 10,000 subscribers:			
Average	33.35	3.79	0.57
Weighted Average	42.08	4.76	0.98
Total:			
Average	40.77	4.72	0.81
Weighted Average	54.55	6.70	1.31

Summary of FCC Survey Concerning the Percentage of Channel Capacity Used by Carried and Added Must-Carry Stations

		Percentages	
Subscriber Category	Average Channel Capacity	Percentage of Channel Capacity used by Must-Carry Stations	Percentage of Channel Capacity used by Added MC Stations
Greater than 50,000 subscribers:			
Average	56.96	11.61	2.36
Weighted Average	56.40	12.85	2.64
Between 10,000 and 50,000 subscribers:			
Average	54.16	11.88	2.30
Weighted Average	54.99	11.97	2.23
Less than 10,000 subscribers:			
Average	33.35	11.36	1.71
Weighted Average	42.08	11.32	2.32
Total:			
Average	40.77	11.58	1.99
Weighted Average	54.55	12.28	2.40

1995 FCC Survey

Average Percentage of Cable System Channel Capacity Occupied by Broadcast Stations that Elected Must-Carry and Retransmission Consent



Average Percentage of Cable System Channel Capacity Occupied by Must-Carry Stations Added as a result of the Must-Carry Requirements of the Cable Act of 1992

FOR THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

DEFENDANTS' JOINT SUBMISSION OF EXPERT AFFIDAVITS AND REPORTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

VOLUME II.B

* * * *

Dated: May 26, 1995

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

EXPERT DECLARATION OF JEFFREY H. ROHLFS

I, Jeffrey H. Rohlfs, depose and say as follows:

Qualifications

1. I am a Principal of Strategic Policy Research, Inc. ("SPR"), an economics and consulting firm located in Bethesda, Maryland. I received a Ph.D. in economics from M.I.T. in 1969, and an A.B. degree in economics from Amherst College in 1965. My primary field at M.I.T. was econometrics, which is statistical analysis of economic data.

2. As a Principal of SPR, I provide consulting services to a variety of clients in the communications industries, including cable and mass media. I have consulted for companies and governmental organizations in the United States and in several other countries. Before cofounding SPR in 1992, I was a Vice President of National Economic Research Associates, Inc. ("NERA") and, prior to that, a Principal of the consulting firm of Shooshan & Jackson Inc., which merged its practice with that of NERA. Before beginning my consulting practice, I was Department Head for Economic Modeling Research at Bell Laboratories, and (on a two-year rotational assignment) Manager of Microeconomic Analysis at AT&T. During the 1974-1975 academic year, I was on the faculty of the Stanford Graduate School of Business, where I taught microeconomic theory, managerial economics, and economic forecasting. I am the author of numerous studies and articles dealing with issues confronting the communications industries, and have spoken frequently to academic and business groups. I have ap-

peared as an expert witness in regulatory proceedings in the United States and Canada. My curriculum vita, including publications and prior testimony, is attached as Exhibit A.

3. I have done a considerable amount of consulting, specifically on cable and mass-media issues. Since 1993, I have personally had substantial participation in all the following projects:

- √ For Fox Broadcasting: Anaysis of foreign ownership issues;
- √ For Rogers Cable Systems: Analysis of synergies between media industries;
- √ For Bell Atlantic: Advice on the planned TCI acquisition;
- √ For a consortium of small cable companies: Advice on cost-of-service regulation;
- √ For National Association of Broadcasters: Analysis of cable rate regulation.

4. Moreover, in the course of my professional career, I have conducted dozens of large-scale statistical studies, involving many different kinds of models. I have analyzed viewership ratings data, both quantitatively in formal statistical models and qualitatively to give consulting advice.

Compensation for Testimony

5. SPR is being compensated for the preparation of my testimony. The billing rates of employees of SPR are shown in Exhibit B.

Summary of Report

6. This report describes a statistical study that was conducted under my direction. The study assesses the effect of cable cariage (or non-carriage) on the viewership of local broadcast stations. Principally, my statistical study supports the following conclusions:

- √ Drops by cable systems have a substantial adverse effect, and cable adds have a substantial beneficial effect, on broadcast station rating. In my study, when a broadcast station is dropped from a cable system, viewership in households served by the system—whether measured by share, average daily circulation, or net weekly circulation—declines to approximately zero.
- √ The sample itself demonstrates harm to a significant number of households. The stations in the sample serve television markets that had 27 million television households in 1992. To the extent that cable drops cause the quality of over-the-air programming to decline, 10 to 13 million households were harmed in a typical week by the drops assessed in this study. This amounts to 11 to 14 percent of all U.S. households in 1992.
- √ Cable systems drop broadcast stations which have significant viewership. I found no empirical support for the notion that declining viewership caused cable systems to drop the stations in the sample. Indeed, in my study, the broadcast stations that were dropped had average ratings in the latest year where data were available of 3.3 (Share), 10 (Average Daily Circulation), and 22 (Net Weekly Circulation).[1]

7. My report also includes a preliminary analysis of viewership of broadcast stations that are not carried by cable systems. Contrary to the assertions in Dr. Besen's Expert Statement, my preliminary results indicate that cable systems did not carry approximately 22 percent of the stations that Dr. Besen defines as local. Also, the

[1] Arbitron defines Share as the amount of time spent viewing a broadcast station as a percent of the amount of time spent viewing all broadcasters and cable networks. Average Daily Circulation is the percent of households that view the station in an average day. Net Weekly circulation is the perecnt of households that view the station for at least 5 minutes once during the week.

viewership of those stations substantially exceeds Dr. Besen's estimate.

Statistical Analysis of Effects of Cable Carriage and Non-Carriage on Viewership

8. My statistical study of the effects of carriage and non-cariage utilizes two sources of data. One source is a database on carriage of broadcasters by U.S. cable systems. That database is maintained by Cable Database Corporation ("CDC"). CDC is a private company that serves as a repository of information gathered from cable-system copyright filings, as generated by each U.S. cable system and filed with the Copyright and Licensing Division of the Library of Congress at the end of each six-month period in each calendar year. CDC supplements the information provided by cable companies in part by identifying counties served by each individual cable system by cross-referencing against the communities listed as being served by each cable system. Mr. Meek provided specifications to help extract the appropriate information from the CDC database. The extracted information concerns instances where cable systems dropped broadcasters between 1985 and 1992. Mr. Meek's declaration provides further detail regarding the CDC database and the methodology used to extract data from the database.

9. The second source of data used in the statistical study is the Arbitron Television County Coverage report for cable and non-cable viewing in cable-controlled households. These Arbitron reports provide information on shares, average daily circulation, and net weekly circulation of broadcasters and cable networks in each county. The reports distinguish between cable and non-cable television households.

10. The CDC reports that I used for my study are the Drop Detail Report and the Station Carriage History Reports. Among other things, these reports are designed to show cable carriage (or lack thereof) for broadcast stations in all instances where:

a. A cable system carried a broadcast station as a local signal at sometime during the 1984-1992 period;

b. The cable system subsequently (during 1985-1992) dropped the station for a minimum of two consecutive semi-annual periods; and

c. The broadcast station did not discontinue operations during the 1985-1992 period.

Stations are identified by station type (*i.e.*, ABC, CBS, NBC, Fox, educational, religious, specialty, and inde- were limited to systems within 50 miles. The data provided also include, among other things, the station's call sign, city of license, county, Arbitron television market (ADI), cable system name, primary community and county served by the cable system, and number of subscribers for each semi-annual period.

11. In sum, the data included more than 7,000 instances of drops of commercial and educational local broadcast stations. Since analyzing viewership in all of these instances was not feasible, a sample of station/county combinations was selected for more detailed analysis. The objective was to define an expedious sampling proces that would identify instances where cable drops were large relative to the size of the county. The latter criterion facilitates precise estimation of the effects of cable carriage and non-carriage. Suppose, for example, that a cable system of 10,000 subscribers drops a broadcaster. The effect on viewership is easy to see if the county has a population of 20,000. The drop would have a much smaller proportional impact on viewership if the county had a population of 1 million. In the latter case, statistical analysis cannot easily distinguish the effects of the drop from other factors (*e.g.*, success or lack of success of new program series) that affect viewership from year to year. The sampling procedure that I used in my study is discussed in more detail in Exhibit C.

12. After using the above procedure to select a sample of station/county combinations, I performed a number of consistency checks and reasonableness tests on the CDC data.[2] These checks are explained in Exhibit C.

13. Any remaining errors in the CDC data would cause the effect of cable drops (and adds) to be underestimated [3] and decrease the probability of getting statistically significant results. However, in my study, the effects on viewership turn out to be so large that they clearly can be identified as statistically significant.

14. The final sample consisted of 89 station/county combinations. Multiple years of data were available for each combination. The sample included 30 VHF stations and 59 UHF stations. The station types were as follows:

√ 28 affiliates of ABC, NBC, and CBS;

√ 8 stations that were originally, or became, affiliates of Fox;

√ 5 religious broadcasters;

√ 22 (other) independents; and

√ 26 educational stations.

15. The Arbitron data are based on a sample of cable and non-cable television households. As previously noted, the station's share represents the amount of time spent viewing that station as a percent of the amount of time spent viewing all broadcasters and cable networks. Average daily circulation is the percent of households that view the station for at least 5 minutes in an average day.

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[2] Because of the short time available to conduct the study, I had not been able to perform all consistency checks prior to submitting my expert report and addendum thereto. I have now completed additional checks to eliminate potentially inappropriate stations from the sample.

[3] *See* J. Johnston, *Econometric Methods*, 2nd ed., New York, McGraw Hill, 1972, pp. 281-283.

Net weekly circulation is the percent of households that view the station for at least 5 minutes once during the week. Arbitron data are based on sampling during 4 months: May, July and November of the year prior to the report and February of the year of the report.

16. For purposes of this study, we obtained, to the extent possible, Arbitron Television County Coverage data for the 89 stations in the sample. Statistical analyses were performed to estimate the effect of cable drops (or adds) on these three measures of viewership. The key explanatory variable is number of subscribers of cable systems that dropped the broadcaster (expressed as a fraction of cable households in the county). The variable takes negative values (also expressed as a fraction of cable households) in years when cable ssytems first began or resumed carrying a broadcaster. Thus, the model reflects the positive effects of cable carriage, as well as the negative effects of drops.

17. One cannot tell, on the basis of the data extracted from the CDC database, precisely when a drop occurred (within a semiannual period). Consequently, one often cannot be sure whether a drop occurred before or after a particular Arbitron sampling month. The drop variable used in the analysis is defined to closely reflect the Arbitron sampling cycle. [*See* Exhibit D.] Nevertheless, errors with regard to timing inevitably remain. Under such circumstances, traditional statistical methtod yield biased results. I took special measures, described below, to minimize the degree to which timing errors bias the results of this study.

18. The effects of errors in timing can be illustrated as follows: Suppose we know that a cable drop occurred during the first half of the year, and we assume that it occurred in March. We would then conclude that the drop would affect the difference in February Arbitron ratings between the current year and the following year. Suppose, however, that the drop actually occurred in January. In that case, the drop would actually affect the difference in February Arbitron ratings between the current year and the previous year. The timing error causes two prediction errors. Viewership ratings are overestimated in the earlier period, when the drop actually occurred. Ratings are underestimated in the later period, when the drop was assumed to have occurred but did not.

19. To reduce the effect of these timing errors, I included cable drops (and adds) with three different lags in the statistical model. The additional lagged variables capture some of the effects of a drop (or add) when the timing differed from what was expected.

20. I also developed a way to correct for the bias of timing errors. My estimation methodology was first to use standard statistical techniques. I then corrected for the timing bias in order to develop the final estimates. The correction for bias is developed in the context of a plausible, even-handed model of the effects of cable drops within semiannal periods.

21. In the statistical analysis, after correction for timing errors, I found that when a station is dropped from a cable system, viewership in households served by the system—whether measured by share, average daily circulation, or net weekly circulation—declines to approximately zero.

22. Apparently, few, if any, cable subscribers are willing to undergo the inconvenience (and possibly the expense) of receiving broadcast stations over the air after the stations are dropped by a cable system. Statistical output confirming these results is shown in Exhibits E and F.

23. The prior discussion has focused on errors associated with the CDC data and the timing of drops. The Arbitron data also contain errors. Arbitron ratings are based on a sample of television households and therefore contain sampling errtr. They further contain rounding

errors when ratings are given to the nearest whole percent. However, there is a key distinction: the CDC data are the explanatory variables; the Arbitron ratings are the variables to be explained. It is a well-known statistical result that errors in the variables to be explained do not generally cause estimates to be biased. Furthermore, the usual statistical tests of significance are valid, even though the variable to be explained may be subject to sizable measuremeht errors.

24. In the statistical model, the variables to be explained are proportional growth rates for share, average daily circulation, and net weekly circulation. The growth rate is expressed as a proportion of the new rating in years when the rating increased. It is expressed as a proportion of the old rating in years when ratings declined. This model formulation is consistent with a zero net effect if a cable system (with a fixed number of subscribers) drops a broadcaster and subsequently adds the broadcaster back. (That would not be the case if growth rates were always expressed as proportions of the old rating or always expressed as proportions of the new rating.) Proportional growth rates are undefined when ratings in a particular year and the previous year were both both zero. The statistical model excludes years when that occurred.

25. The final samples used in the statistical models were as follows:

Equation	Station-County Combinations	Total Observations
Share	59	189
Circulation	64	216

26. According to the usual test statistics (*F* test), the variables reflecting cable drops (and adds) are highly significant (1 percent level) in all three equaitons; *i.e.*, the equations for share, for average daily circulation, and for net weekly circulation. That means that with con-

fidence of 99 percent, one can reject the notion that cable drops do not affect broadcast viewership in cable households. I also tested for statistical significance in a more robust model that allows for statistical errors in one year to be correlated with errors in other years. The variables for cable drops (and adds) continued to be highly significant (1 percent level) in this more robust model, as well. One can therefore reasonably infer that the estimated effects are real and not statistical flukes. Statistical output for the more robust model is shown in Equations (4) to (6) in Exhibit F.

27. The statistical model is stated in terms of year-to-year changes in rates. The overall viewership trends in cable households do not vary significantly among different types of broadcasters.

28. My statistical model allows for the possibility that cable drops affect VHF and UHF stations differently. However, I found the same result for both types of stations: when a station is dropped from a cable system, its ratings in those cable households decreased to approximately xero.

29. I also conducted additional tests to see whether the effect of cable drops (and adds) differed for different types of broadcasters. I found no significant differences in such effects:

- √ between commercial and educational stations;
- √ between religious broadcasters and other broadcasters; or
- √ between network and non-network stations (where network is defined to include ABC, CBS, NBC, and Fox).

30. I examined data on non-cable households and found no significant relationship between cable drops and non-cable viewership. [*See* Equotations (7) to (9) in Exhibit E.] Indeed, cable drops had less explanatory

power than would be expected from a series of random numbers. One can therefore reasonably infere that the declines in shares, average daily circulation, and net weekly circulation for cable households are the results of drops—not the result of other factors (*e.g., possible* declines in program quality) that simultaneously affected the stations' viewership. In the latter case, drops would be a good explanatory variable for non-cable viewership, as well as cable viewership. That is contrary to the statistical results. Accordingly, my study provides *no* empirical support for the notion that declining viewership caused cable systems to drop the stations in the sample.

31. The sample results are important, in themselves. The counties analyzed in the sample have over 2 million television households (based on Arbitron data in the last year of the sample for which complete data for the station are available). The average of the shares of these stations in the latest year when data were available was 4.5, the average daily circulation was 14, and the net weekly circulation was 30. These stations serve television markets that had 27 million television households in 1992.[4] To the extent that prior cable drops caused the quality of over-the-air programming to decline, 10 to 13 million households weer harmed in a typical week—assuming net weekly circulation is approximately the same in the whole television market as in the county analyzed. (Higher numbers within the range are applicable to the extent that different households view different broadcasters in the same television market.) This amounts to 11 to 14 percent of all U.S. television households in 1992.

32. I also examined ratings of all stations (in the entire sample) that were dropped—including those excluded from the statistical analysis because of zero ratings in particular years. The averages of these ratings in the latest year when data were available are as follows:

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[4] Warren Publishing, Inc., *1993 Television & Cable Factbook.*

Share:	3.3
Average Daily Circulation:	10
Net Weekly Circulation:	22

33. The sample results also have relevance to a much broader population of broadcasters and cable systems. For example, many drops were excluded from the sample simply because a cable system served more than one county in the ADI. Those drops were excluded to facilitate statistical analysis of county data. However, the impact of a drop should be independent of whether the impacts of drops that cross county lines should resemble those analyzed in the sample. In addition, many drops were excluded because they were too small to analyze statiscally. However, one would expect the effect of small drops to be proportionate to that of larger drops. That is, the effect on broadcast viewership of drops by two cable systems, each having 10,000 subscribers, should be comparable to that of a single drop by a cable ssytem of 20,000 subscribers. Taking these factors into account, one can reasonably conclude that the sample results would apply to a substantial portion of the total drops identified in the CDC database.

Analysis of Viewership of Broadcast Stations Not Carried by Cable Systems

34. Dr. Besen, in his expert statement, asserts, ". . . in the absence of must carry rules . . . 95 percent of all local stations with measurable viewing were carried, and together these stations accounted for 99 percent of the viewership of all local stations." The first part of this assertion is misleading; the second part is simply incorrect.

35. Superficially, Dr. Besen's statement seems to imply that 95 percent of all local stations were carried. In reality, Dr. Besen's own data indicate that only 78 percent

of the stations that he defines as local were carried. The difference lies in the qualifier "with measurable viewing."

36. Even the qualifier misstates the case. The great majority of the stations excluded by Dr. Besen in fact have measurable viewing," that is to say, their viewership is large enough to be measured. What Dr. Besen means by "measurable viewing" is stations whose shares round to 1 percent or more in the particular database that he examines.

37. Dr. Besen's calculations of 99 percent viewership is driven primarily by rounding errors. In that calculation, the 17 percent of broadcasters who are not carried and have shares of less than 1 percent are all rounded down to zero. A single rounding error of this kind would have negligible effect on the results. However, the rounding errors apply to 17 percent of the data. Furthermore, all the rounding errors are in the same direction—down. These errors clearly bias Dr. Besen's result.

38. I developed a rough estimate of the aggregate share of the excluded stations by making the reasonable assumption that they have an average share of ¼; *i.e.*, half way between zero and the point at which they would be rounded up to 1 percent. Under this assumption, the aggregate share of the excluded stations is 4.25 percent. This amount should be added to Dr. Besen's estimate of 1 percent to get a reasonable estimate of the viewership of the non-carried broadcasters in his sample—corrected for rounding error. My preliminary conclusion is that broadcasters that he defines as local and that are not carried account for approximately 5 percent of total viewership.

39. Dr. Besen does not reveal the total amount of viewer-ship of all local stations, according to his definition. It is probably on the order of 40 hours per week. Thus, the viewing share of non-carried broadcasters

amounts to about 2 hours per week. That amount of viewership is certainly significant.

40. The above estimates are very rough, but they are almost surely more accurate than Dr. Besen's estimates. I plan to refine my estimates in rebuttal testimony in this proceeding.

Conclusions

41. In summary, my statistical study shows that drops by cable systems had a substantial adverse effect, and cable adds had a substantial beneficial effect, on broadcast station ratings. For example, in my study, when a station was dropped from a cable system, its share, average daily circulation, and net weekly circulation in those cable households decreased to approximately zero. In addition, my sample itself demonstrates harm to a significant number of households. To the extent that cable drops lead to a decline in program quality, approximately 10 to 13 million households (or 11 to 14 percent of all U.S. television households in 1992) were harmed in a typical week by the drops assessed in this study. Finally, I found no empirical support for the notion that declining viewership caused cable systems to drop the stations in the sample.

42. My preliminary results indicate that cable systems did not carry approximately 22 percent of the stations that Dr. Besen defines as local. Also, the viewership of those stations substantially exceeds Dr. Besen's estimate.

May 25, 1995

/s/ Jeffrey H. Rohlfs
JEFFREY H. ROHLFS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

AFFIDAVITS IN SUPPORT OF TIME WARNER ENTERTAINMENT COMPANY, L.P.'S MOTION FOR SUMMARY OF JUDGMENT

* * * *

May 26, 1995

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

AFFIDAVIT OF LAURENCE ZIPIN

LAURENCE ZIPIN, being duly sworn, deposes and states as follows:

1. I am Corporate Vice President of advertising sales at Time Warner Cable ("TWC"), an unincorporated division of Time Warner Entertainment Company, L.P. ("TWE"). I submit this affidavit in support of Plaintiffs' Motion for Summary Judgment. The facts set forth below are personally known to me to be true, and reflect the results of my investigation within TWC in connection with this litigation.

2. I have been Corporate Vice President of advertising sales for 3 years. Before that I was Vice President of advertising sales at Warner Cable. In total, I have been involved with the advertising aspect of the cable industry for nearly 14 years.

Cable Advertising

3. Advertising by a cable operator occurs in one of two ways. The first way a system can offer advertising is by inserting ads into the cable network programming which is offered on their systems. Cable systems cannot insert advertising; or "local avails", on cable network programming without obtaining permission to do so from the programmer, for which TWC negotiates. Some programmers (typically pay services such as HBO, Showtime and Disney) do not contain any advertising. When TWC is able to contractually secure a right to insert ads on a cable programming network, it typically is permitted 2

minutes per hour. The second way advertising is accomplished is through ads on locally originated channels. This represents only a small fraction of our ad revenue. Much advertising seen on cable services is sold by the cable programmers themselves and does not inure to the benefit of operators.

4. The primary source of cable advertising revenue for cable operators is derived from local advertisers. Local advertisers account for approximately 90% of cable ad sales. We compete with all broadcast stations, including network affiliates and independents, for advertising revenue. Competitors for local advertising dollars also include local TV stations, local radio stations, newspapers, magazines, billboards, flyers and the yellow pages. Because of the broader reach of broadcast and network television, we do not pose much competition for broadcasters in attracting national and regional spot advertising. Only 10% of cable advertising revenues come from national or regional advertisers who buy avails on the same network in multiple markets. For local broadcasters, national spots account for 40-50% of their ad sales.

5. Although cable advertising revenues have increased over the years, they are still only a minor source of revenues for the cable industry. In 1994, only 4.4% of TWC's revenues were derived from advertising.

6. Although the percentage of advertising as a source of revenues has been gradually increasing, there is no reason to believe advertising will become a major source (10% or more) of cable revenues within the next 20 years. By far the most significant source of cable revenues comes from cable subscribers.

7. Basic and tier subscribership was the source of 62.3% of TWC's total 1994 revenues. Another 25.5% of TWC's 1994 revenues are derived from pay-per-view mini-pay, and pay television. Equipment charges and installation account for another 6.1% of TWC's 1994 revenues. Since TWC entered the cable business in the

1960's, the primary source of its revenues has been subscriber fees. Thus, TWC's business plans revolve around attracting and maintaining customers through program offerings and *not* advertising revenues.

8. In 1994, TWC spent more than twice as much on license fees to acquire cable programming (excluding pay per view and pay networks) than advertising sales cash flow recouped. Thus, if the quality and desirability of the programming were equivalent, TWC systems would have a powerful incentive to replace cable programming networks with broadcast stations.

9. Because subscribers provide the bulk of cable revenues, programming is the mainstay of the business. When making programming decisions at the highest levels, the impact on advertising sales and the possibility of drawing viewers away from the cable networks with local advertising by adding tiers or mini-pays is rarely a consideration. The advertising sales department is typically not consulted in programming decisions, nor do I anticipate this being the case in the foreseeable future. Advertising is viewed as an incremental opportunity to be taken advantage of when and where possible. It is not the kind of priority that affects the strategic direction at TWC.

10. Insertion of commercials requires special equipment for each channel on which ads are inserted. The equipment, which is currently primarily analog tape based equipment, is expensive and highly complicated to install and run. For each channel, the equipment costs $15,000-$20,000 on top of a core of control and tape editing equipment that costs approximately $100,000. In addition, cable operators encounter logistical difficulties and incur costs for editing, creating, selling, logging, inserting and billing spots run for each channel in each headend that the system serves. All of these factors have affected the growth of the cable advertising business. The average TWC system has inserted avails on only 11 chan-

nels, both because the expense of additional equipment is substantial and because only the several most popular cable networks are sufficiently attractive to a broad enough base of advertisers to be viable candidates for ad insertion.

11. Even though the avails are part of cable network carriage agreements, there are difficulties in marketing the total amount of inventory. Many of our systems don't have the equipment needed to insert ads on services even though we have the contractual right to do so. Similarly, even where equipment is in place, we often are unable to sell a large fraction of the avails provided to us by contract. Thus, ad avails are far from sold out.

12. Ad sales revenues are concentrated on a very small group of successful cable networks. Our top 4 services represent more than half of TWC's cable ad revenues.

13. The select group of networks from which most local cable ad revenues are derived are also the most often viewed cable networks. They are in high demand by subscribers and would be carried with or without advertising avails. Conversely, the cable networks most frequently dropped or refused carriage to accommodate must-carry requests are typically networks carried on channels without ad insertion capability and are networks with low enough advertiser interest as to make advertising on them infeasible. For that reason as well, the possibility of reaping ad revenues plays no part in the decision of whether to carry a broadcast station or a cable network.

Ratings

14. Advertisers use measurement of viewers to judge the attractiveness of a program or station or cable network as a placement for ads. The primary ways by which an audience for a show is measured are: ratings, which are defined as the percentage of all households tuned in to a station; and shares, which reflect the percentage of

households which are turned on that are tuned to the station in question. "Cumulatives", a third form of determining audience size, measure ratings for shorter viewing segments over a longer period of time, usually a week. Because the measured viewing segment is as short as 5 minutes, the number includes viewers who are simply "channel surfing". This figure is of far less interest to advertisers than ratings or shares because it is unlikely that the viewership includes those seeing their commercial.

15. The value of advertising is directly linked to viewership. It is well known that broadcasters have garnered the large majority of audience share. The 4 networks combined attract an average of 50-60% of all viewers. This percentage is not expected to change very much in the foreseeable future.

16. If must-carry stations are having problems with advertising revenue it is because their ad revenues are linked to their ratings. If their programming is attracting viewers, it will also attract advertisers. This is so for cable programming as well.

17. Similarly, viewership affects carriage decisions. Because subscribership is the major source of revenues, TWC systems would not drop a local broadcast station if it would interfere with or lessen subscribership in any way. Popular broadcast TV stations have been, are and will be carried whether or not must-carry is in effect. Customer demand is a primary consideration of operators when deciding what to carry.

Broadcast TV Stations

18. Broadcast TV stations have several advantages over cable systems in terms of appeal to advertisers: TV stations reach the audience in their whole DMA, while cable systems reach only a limited number of subscribers; it is significantly easier to negotiate with a single local

network affiliate rather than numerous cable systems; broadcast TV stations' technology is less complicated and produces a better on-air result than cable in terms of advertising; and monitoring the ads are much easier if the ads are placed on a local TV station, because an advertiser can simply turn on his or her own television to see if the ad was aired as promised. For a cable system, the advertiser can only monitor his ads if he or she is a subscriber to the system on which the ad is placed. Even then placement is rarely predictable. If the ad is running on more than one system monitoring is virtually impossible. The attractiveness of local TV broadcast stations as a source for TV advertisers is reflected in the statistics: 93% of the money spent on local television advertising in the last 12 months went to local broadcast TV stations.[1]

19. Cable advertising is technically very far behind broadcasting. Cable has been, and is still primarily, using tape. The tapes are copied several times and the quality of the ad suffers. The perception of cable in the advertising industry is that it has poor video quality.

20. Furthermore, there is the issue of timing. In many places, ads are still played on sequential rotation. An advertiser is sold a day or a day part rotation. Its ad is then one of a series of ads which is rotated through the programming that day. Because the rotations depend on the number of advertisers that buy into the rotation, it is impossible to predict when or how often the ad will run. Broadcast TV stations, on the other hand, are able to sell ads for specific programs with specific time slots. Thus, broadcast TV stations have significant technical advantage over cable in terms of ads. This is in addition to the advantage they have in viewership.

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[1] *Kagan Media Index*, No. 99, 5/16/95, p. 8, 9.

The Future of Cable Advertising

21. Digital insertion is a recently developed technology which makes ad insertion more efficient. An array of equipment can be placed into headends which allows the advertisement to be delivered digitally. In this way the ad is distributed more reliably onto the cable network in the avail in which it is scheduled to be shown. This will help cable ensure the quality and placement of their ads.

22. Digital insertion equipment is still considered experimental and is expensive and complicated to install.

23. It will be 5 to 10 years before digital insertion equipment makes a significant impact in terms of increasing cable advertising revenues. Currently only 8 of TWC's over 100 local ad sales offices are using this technology. Future plans call for insertion equipment to be added in the largest offices in the next 3 years.

24. Even on this schedule, implementation of digital technology at TWC is rather advanced. It will be several more years before the technology is common industry wide.

25. The crucial factor to remember about digital insertion technology is that it represents an advance to cable advertising in that it delivers *broadcast quality* advertising technology. Cable is still merely trying to catch up with broadcast TV stations in their ability to offer quality ad services. It will be years before they succeed and even longer before advertisers' and ad agencies' perception of cable advertising changes.

26. Other trends in the cable industry include clustering and interconnection. Interconnects represent a cooperative effort on the part of local cable systems to make advertising available on a regional or DMA level. Only 2 regions, San Francisco and New York City, are fully interconnected thus far. Other areas, such as Los Angeles, are substantially interconnected but still have large gaps

in coverage as a significant number of systems are represented by different regional rep firms. The logistical difficulty of getting agreements from many systems makes me skeptical of getting more than a handful of markets interconnected in the next few years. Even when interconnected, cable systems merely inch closer to the natural advantages of local TV broadcasters in coverage of an area. Interconnection cannot address the many other disadvantages at which cable operates, including the fact that 40% of the homes passed by cable do not subscribe to it, and hence are unreachable.

27. Clustering is a similar phenomena in which the local systems with common ownership can market and operate their advertising business together. The primary purpose of TWC's clustering is to achieve economies of scale. Having several local systems cuts down on costs and thus increases cash flow. As far as advertising is concerned, clustering is merely another way of attempting to coordinate ad sales to approach some of the natural efficiencies enjoyed by broadcast TV; it does not address myriad other handicaps under which cable systems compete for advertising.

28. In addition, TWC hopes in the future to provide subscribers with telephone service and provide competition to local telephone companies. The telephone connection will also be of use in Full Service Networks if and when they are operative on a larger scale. Advertising will be an incidental beneficiary of clustering. Improving advertising sales was not the primary purpose of the acquisitions. The advent of clustering does not affect conclusions I expressed earlier in this affidavit about the relative value of advertising and its ability to capture a share of the advertising market.

Conclusion

29. In summary, advertising revenues are only a very small percentage of cable revenues and do not recoup the license fees paid to acquire the licenses for the programming in which they are inserted. Therefore, they are not and will not be a significant factor in programming choices. Although technology will improve prospects for cable advertising, the changes will take time to implement. Furthermore, the changes will not materially effect the distribution of national spot advertising. It is not anticipated that cable advertising will become a major source of TWC's revenues in the foreseeable future.

May 25, 1995

/s/ Laurence Zipin
LAURENCE ZIPIN

[Jurat Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

APPENDIX TO
PUBLIC BROADCASTER DEFENDANT-INTERVENORS'
MOTION FOR SUMMARY JUDGMENT

VOLUME 1

(DECLARATION OF DAVID J. BRUGGER)

* * * *

Dated: May 26, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

DECLARATION OF DAVID J. BRUGGER

1. Since January 1988, I have been the President of the Association of America's Public Television Stations ("APTS"). (APTS was previously known as the National Association of Public Television Stations ("NAPTS").) As President, I am responsible for supervising all aspects of APTS activities. From 1981 to 1988, I held the positions of Director, Broadcast Services, Vice President, Telecommunications, and Senior Vice President at the Corporation for Public Broadcasting ("CPB"). During my tenure at CPB, I was responsible, among other things, for administering grants made by CPB to noncommercial educational stations. From 1977 to 1981, I held the position of general manager of WUFT, a public television station located in Gainesville, Florida. From 1970 to 1977, I worked for the Iowa Public Broadcasting Network in production and operations positions, including Director of Administration for the network, a position I held from 1973 to 1977.

2. APTS is a nonprofit organization whose members constitute about 80% of the public television stations in the United States. APTS represents the interests of all public television stations before Congress and federal administrative agencies. It also provides planning, research, and communications support services to APTS members.

3. Based on my past experiences, as well as my current position, I am very familiar with public television station operators. I personally know the majority of public television station managers. I speak with station managers,

on almost a daily basis, about issues related to station operations, and I have frequent opportunities at industry meetings and during visits to stations to talk with station managers. Particularly during the period from 1988 to 1992, I had numerous discussions with station managers about cable carriage problems and concerns.

BACKGROUND

4. The federal government has played a key role in the development of public television in the United States. In 1952, the FCC authorized the allocation of a portion of the broadcast spectrum for noncommercial educational television and radio licenses. In 1962, Congress first provided funds for the construction of public television facilities. In 1967, Congress adopted the Public Broadcasting Act to encourage the growth and development of public television and radio stations. Over the years, a substantial amount of public television's financial resources have come from federal appropriations. From 1962 to the present, Congress has appropriated over $4.8 billion in support of public broadcasting. In fiscal year 1995, the total annual federal appropriation for public broadcasting was $285.6 million. This amounted to approximately 14 percent of the total financial resources of public television stations in that year. Today there are 351 public television stations, operated by 179 public television licensees, spread across the country's approximately 211 television markets.

5. There is a wide variety among public television stations. Noncommercial educational television licensees include a diverse array of local school boards, municipalities and other state and local agencies, public and private colleges and universities, and a variety of other local and community-based nonprofit organizations dedicated to providing educational, informational, cultural, and other alternative noncommercial programming to their communities. Some public television stations offer a high percentage of programming distributed by the Public Broadcasting Service ("PBS"). Others focus more on telecourses or other instructional programming from non-PBS sources. Still others concentrate on special interests of minority audiences.

6. In general, where there is more than one public television station serving a market, the different stations fill different niches. For example, in Miami, WPBT, licensed to a non-profit community organization, broadcasts primarily the PBS-fed program service. In contrast, WLRN, licensed to the Dade County School Board, provides primarily instructional programming in conjunction with the local schools, community colleges and universities.

* * * *

14. During the period 1988 through 1992, APTS regularly received cable carriage information from general managers or other knowledgeable employees of public television stations. I am aware from my knowledge of APTS files that this also occurred in the 1985-1987 period, prior to my arrival at APTS. On several occasions, APTS sent surveys to public television stations and received responses reporting on drops, shifts, or other cable carriage experiences. Several examples of survey forms received by APTS are attached as Exhibit 1. In other cases, station personnel forwarded to APTS copies of correspondence and other documents relating to cable carriage in response to our ongoing requests to keep APTS advised of adverse cable actions. I and other APTS personnel regularly received telephone calls from station personnel reporting on cable carriage problems.

15. Beginning in 1987, when Dr. McGuide joined APTS, APTS staff members working under her supervision periodically compiled lists of cable drops and shifts reported by public television station personnel. As part of this process, the individuals working under Dr. McGuire's supervision called cable system personnel in order to verify that drops and shifts had actually occurred and were still in place. Exhibit 2 is a form used by APTS

staff to verify drops and shifts with cable operators. By the early 1990s, APTS staff members were also making efforts to determine whether the reported actions (including previously reported drops and shifts) involved cable systems whose headends were located within 50 miles of the station's community of license or within the station's Grade B contour.

* * * *

18. APTS has received additional documents from public television stations in the normal course of business that describe adverse carriage actions that are not reflected on either Exhibit 3 or 4. In order to provide a more comprehensive listing of APTS's information on drops and shifts, APTS staff have prepared a list that compiles and reorganizes information from Exhibits 3 and 4 and that also includes information from other APTS documents reporting on carriage actions in the 1986-1992 period. This list is attached as Exhibit 6.

19. I have carefully reviewed Exhibit 6 and have been fully briefed by my staff on the procedures used to compile it. The information on Exhibits 3 and 4 was edited to exclude drops or shifts involving cable companies outside the Grade B contour or 50-mile radius and was reorganized alphabetically by station call letter. APTS staff then added information from contemporaneous documents that were received by APTS, in the regular course of business, from station personnel knowledgeable about cable carriage matters affecting their stations. Before adding these new entries to the list, APTS staff made efforts to confirm that cable systems involved met either the 50-mile or the Grade B contour criterion contained in the definition of "local public television station" in the 1992 Cable Act. Reports of adverse action were not included if the underlying documentation did not have enough details or the APTS staff was unable to confirm that the cable system was local to the public television station. Exhibit 6 reflects 130 instances of drops, 203 instances of shifts, and six instances

of unwanted timesharing that were reported by stations between 1986 and 1992.

20. Exhibit 6 should not be considered a comprehensive compilation of drops and shifts incurred by public television stations during the 1986-1992 time period. It merely reflects information that was available to the stations and was supplied voluntarily to APTS. Many of the smaller stations, which have been most affected by adverse cable actions, are not members of APTS and did not regularly communicate with us.

* * * *

24. I believe that the cable drops and shifts reported to APTS between 1985 and 1992 understate the actual instances of drops and shifts, for several reasons. First, not all stations reported incidents to APTS. This was particularly true of non-APTS members, which included some of the smallest stations, which were most vulnerable to cable drops and shifts. Second, stations that did provide us with information did not necessarily report all instances. Third, as explained above, stations—particularly the smaller stations with many different cable systems operating in their service areas—simply could not keep track of cable drops and shifts of their signals.

25. In addition, it was common knowledge at the time that cable systems were exercising self-restraint during a period when must carry regulation was regularly under consideration at the FCC and in Congress. Indeed, I recall that James Mooney, President of the National Cable Television Association, essentially advised NCTA members that they should refrain from dropping or repositioning public television stations in the late 1980s and early 1990s. APTS members and staff believed that drops and repositioning of public television stations would be widespread if there were no threat of must carry regulation or legislation.

* * * *

THE 1990 NCTA-APTS AGREEMENT

29. In the late 1980s and early 1990, cable industry representatives indicated that they wished to work out a voluntary must carry agreement with public television. In early 1990, I began discussions with James Mooney, President of the National Cable Television Association. I presented proposal legislative points to Mr. Mooney for his consideration. I presented proposed legislative points to Mr. Mooney for his consideration. My proposal expanded must carry rights for public television beyond the limits of the FCC's 1986 interim must carry rules. However, it also incorporated provisions designed to limit any burden on cable operators. Thus, under the proposal I presented, the number of public television stations to be carried varied with the channel capacity of the cable system, and no system was required to carry more than three public television stations, unless the additional stations carried non-duplicative programming or the system had previously carried more than three local public television stations. APTS estimated that under its proposal only three percent of cable systems would be required to carry three or more public television stations and that, for 84 percent of cable systems, the proposal meant carriage of only one public television station.

30. Mr. Mooney was generally receptive to our proposal, but he expressed concern about several of its features. In response to Mr. Mooney's expressions of concern, I agreed to several changes in the proposed language. First, I agreed that for cable operators with a channel capacity of 36 or fewer channels, the number of public television signals would be capped at three, except that if a cable system operator subsequently upgraded to a larger channel capacity the operator would carry any additional qualifying public television signals. In addition, I agreed to add a provision that if a cable operator was required to pick up public television stations not already being carried, it could use unoccupied public, educational or governmental ("PEG") channels to carry those stations, subject to approval by the local franchising authority. (Under the Cable Communications Policy Act of 1984, a franchising authority may require a cable operator to designate channels for public, educational or governmental use.) I also agreed that APTS would not seek legislation providing public television stations with the right to seek payment for cable carriage. A copy of my letter to Mr. Mooney setting out those changes is attached as Exhibit 9.

31. In late March 1990, NAPTS and NCTA reached final agreement on a "must carry" proposal for public television that they would jointly recommend to Congress. Mr. Mooney took our agreement to the NCTA Board and subsequently advised me that the Board had approved the terms of the agreement. The press release issued by NCTA and NAPTS announcing the agreement is attached hereto as Exhibit 10. In the joint press statement, Mr. Mooney stated, "From the outset, it's been the intention of both our industries to put in place a pure and simple must carry rule." He went on to state, "and through good-faith negotiations, we have reached a workable compromise guaranteeing that this important form of television will remain an integral part of cable's basic programming package." The legislative language reflecting the agreement Mr. Mooney and I reached is attached as Exhibit 11.

32. In the period following the negotiation of the NCTA-NAPTS agreement, NCTA made significant efforts to head off adverse cable actions involving public television stations. Dr. McGuire, the APTS Director of Planning and Research, filled the role of liaison with the cable industry, working with an NCTA representative. When APTS was notified of a public television station that had received a threat or experienced an actual drop or shift, Dr. McGuire would contact NCTA to seek assistance. In many cases, NCTA was able to persuade the cable operator to reverse its action. As a result of these efforts,

public television stations experienced relatively few drops or shifts in the 1990 to 1992 period.

EXPERIENCE SINCE THE 1992 CABLE ACT

33. Since enactment of the 1992 Cable Act, APTS has provided stations with advice on how to enforce their must carry rights. Public television stations have had varying experiences in attempting to enforce these rights. Some stations have been relatively successful in gaining carriage, while others have had considerable difficulty. A number of stations have found it necessary to file complains with the Federal Communications Commission to enforce their must carry rights.

34. In preparing this declaration, I reviewed a list of the resolved and pending complaints that were filed by public television stations with the Federal Communications Commission. This list, along with the underlying orders from the FCC reflected in the list, are attached as Exhibit 12. As of May 1, 1993, twenty-eight stations have filed 175 complaints with the Federal Communications Commission. Out of 170 complaints that have been resolved (5 are still pending), the Commission has granted carirage, or the complaint has been dismissed because the cable company agreed to carriage, in 135 instances (or almost 80 percent of the cases).

* * * *

37. APTS continues to regard must carry provisions as essential to the ability of public television stations to gain access to a broad range of viewers Cable penetration is currently above 60 percent on a national basis. Thus, loss of access to cable subscribers can cut down very substantially on a station's ability to reach viewers. In addition, there are many more cable programmers now than there were five years ago. Cable operators have an incentive to carry cable programming because (unlike public television) such programming can provide the operator with additional revenue streams, especially in the case

of pay-per-view channels. As cable operators fill their available channel capacity with cable network programming there will be less room for public television stations, at least until cable operators choose to expand their channe capacity significantly. Finally, market incentives will prompt cable operators to drop public television stations or shift them to less desirable channels in an environment in which there is no threat of regulation. As commercial enterprises, cable systems lack incentives to carry programming that does not attract significant dollars or audience. Public television stations, in fulfilling their mandate to serve audiences not served by commercial enterprises, often carry precisely the programming that cable systems find economically unattractive. While a cable operator may carry the principal public television station in a market, in order to attract some usbscribers, it is likely to be reluctant to carry a second or third public television service that focuses on instructional programming or minority interest programming. Without must carry, public television stations cannot effectively pursue the congressional mandate to provide services to all Americans.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 25, 1995.

/s/ David J. Brugger
DAVID J. BRUGGER
President, Association of America's
Public Television Stations

[EXHIBIT 4]

EXHIBIT C

Instances of Harm Reported by Public Television Stations

Call letters		Drop/shift	Date	Actual or threatened	Cable system name	Cable system location	Number of miles from broadcast to sta	Replaced by what type of service	Manager's Comments: Describe harm to station	Describe harm to public
Actual drops, within 50 miles										
WKNO	Memphis	Drop	5/1/91	Actual	Star Cable	Hernando, MS	10	Mississippi ETV moved to WKNO's position; Entertainment Television added	Membership	Viewers tell the station that they prefer WKNO
WVUT	Vincennes	Drop	June 1991	Actual	TCI	Jasper	30	Encore, Court TV, Prime Sports Network	Cable system says WVUT is redundant with WNIN, which is carried by system	Loss of educational programming
Connecticut Public Television		Drops when cable system was rebuilt	in 1988 & 1989	Actual	Greater New England Cablevision	East Lawn Meadow & Eastern	35		8% of prime time audience was from Massachusetts	Deprived of unique programming source; station is careful not to duplicate
KOCE	Huntington Beach	Drop	in 1989	Actual	Sammons	Glendale	40	TNT, Prime Ticket		
Mississippi ETV		Drop	6/30/91	Actual	Storer	Fairhope, AL	40	Mind Extension University, Encore, BET, Court TV		
WPTD	Dayton	Drop	Summer 1990	Actual	Storer	Newport, KY	40			Loss of unique programming
WNIN	Evansville	Drop	2/1/91	Actual	Longeonee Cable	Longeonee, IN	40	CNN	Loss of revenue	Loss of full pty service
WPBT	Miami	Drop (in some areas)	10/1/90	Actual	National Cable	Lake Worth	42		Station resources diverted to fight drop	
Louisiana Public Broadcasting		Drop	10/4/90	Actual	St. Charles Cable TV	Luling, LA	45	unknown	Loss 4,000	Unable to receive Coll. gr Credit, GED and other literacy programs as well as other educational benefits offered by LPB. WYES, the other PTV station, does not offer these courses.
WFYI	Indianapolis	Drop	6/1/91	Actual	New Castle Cable	New Castle, IN	47	Encore	Loss of school contact	Loss of service
WKAR	East Lansing	Drop	6/1/91	Actual	WestMarc	Battle Creek, MI	49	Encore; rearranged system for extended basic tier	592 members of station in system coverage area	Only public TV station in Mich with State Capitol coverage
WIPB	Muncie	Drop	4/18/91	Actual	Jones Spacelink	Bluffton	50	USA	Loss of subscribers	Loss of PBS service and local broadcast source

EXHIBIT C

Instances of Harm Reported by Public Television Stations

Call letters		Drop/shift	Date	Actual or threatened	Cable system name	Cable system location	Number of miles from headend to sta	Replaced by what type of service	Manager's Comments: Describe harm to station	Describe harm to public
Actual drops, over 50 miles										
WCET	Cincinnati	Drop	12/31/88	Actual	Viacom	Dayton, OH	52	Discovery	Subscribers	Loss of alternative PTV source
WUSF-TV	Tampa	Drop	Fall 1990	Actual	American TV & Communications Corp	Brooksville	60	Small system; carries WEDU		
WCMU/WUCX	University Center	Drop	Fall 1990	Actual	Telemedia	Saginaw Bay	60	Weather Channel	Affects 72 members; potential $2681.50 loss	Poor reception of WCMU, lost DVS, stereo; received 30 angry letters
WCBB	Augusta	Drop	Mar 1990	Actual	Cable TV of Kennebunk	Kennebunk	62	Family Channel	6000 HH, 300 members; $25,000 loss/year; high income area	Loss of local WCCB programs, choice of which PBS service to watch
WCBB	Augusta	Drop	Jan 1990	Actual	Moosehead Enterprises	Monson	70	TBS	1250 HH lost	Less choice of which PBS service to watch
KERA/KDTN	Dallas	Drop	11/1/89	Actual	Cablevision	Waco, TX	83	Killeen PTV is currently carried	Loss of audience and subscribers	Loss of PTV to ISD's
WGBX	Boston	Drop	1/1/90	Actual	Warner Cable	Nashua, NH	100		Loss of audience/subscribers	Loss of full service PTV with access to college credit courses and specialized programming
KULC	Ogden	Drop	June 1991	Actual	TCI	Rupert-Burley	100	Pocatello PTV, a much closer signal		
KCPT	Kansas City	Drop	May 1991	Actual	TCI	Columbia, MO	120	System change; a number of services added; already have 2 PTVs	Another PTV asked cable company to drop KCPT; lost 150 members	Served the school district with ITV; district asked cable system not to drop, but they did anyway
KULC	Ogden	Drop	June 1991	Actual	TCI	Idaho Falls	120	Encore, Fox	100-200 members; $3,000 - $4,000	
WGBH	Boston	Drop	12/1/89	Actual	Chesterfield Cablevision	Keene, NH			Loss of audience/subscribers	Loss of full service PTV; much local and national programming is produced by WGBH

EXHIBIT C

Instances of Harm Reported by Public Television Stations

Call letters		Drop/shift	Date	Actual or threatened	Cable system name	Cable system location	Number of miles from headend to ant.	Replaced by what type of service	Manager's Comments: Describe harm to station	Describe harm to public
Actual drops, restored										
Georgia Public Television		Drop	2/1/90	Actual, restored	First Cablevision	Peachtree City	25	TNT	Denied signal to 20,087 cable homes in signal area. Cut off in-school broadcasts. Required one person full time and several execs part time for one month to fight drop. With a month of work, SERVICE WAS FINALLY RESTORED.	Loss of standard PBS programming plus many local outreach specials. General confusion of audiences (who thought station was instigator of the drop.) Many MEMBERS could not receive signal. Loss of confidence in public television.
WJCT	Jacksonville	Drop	4/1/91	Actual, restored	Palm Cable	Palm Coast	45	College station w/ instructional programming	Potential revenue loss of $14,000 per year. Note: An aggressive member campaign and face-to-face meeting with cable co. and parent corporation turned this around and station is BACK ON SYSTEM after 6 week hiatus.	Loss of regional PBS station with close ties to area, specific programs relevant to residents.
WUFT	Gainesville	Drop	2/1/91	Actual, restored	Cablevision of Central Florida	Citrus County	60	Fox	Drop was restored. Info on file at APTV.	
WITF	Harrisburg	Drop	6/1/89	Actual, restored	TV Cable of Waynesboro	Waynesboro	65	Home Shopping	Loss of 500 members. REINSTATED February 1991.	Loss of programming that is specifically geared to Pennsylvania residents, with tax dollars.
WILL	Urbana	Drop	3/20/91	Actual, restored	Sammons	Jacksonville, IL	125	CBS affiliate, Springfield, IL	Station has 115 members in community; had to gear up unbudgeted letter and personal appearance campaign. Station would lose $ from ITV subscription (user pay svc). Potentially pitted WILL against 2 other PTV stns which would stay on system.	Jacksonville schools are subscribers to WILL ITV service. Jacksonville would lose programming unique to WILL.
WCBB	Augusta	Drop	1988 or so	Actual, restored a year later	Longfellow Cable	Kingfield	55		800 HH, 60 members; high per capita	
WCRB	Augusta	Drop	in 1988	Actual, restored in 1989 when cable system rebuilt	NE Cablevision	Scao	50	could not say	6000 HH, 300 members; $25,000 loss/year; high income area	City council got company to promise to restore
KRMA	Denver	Drop	3/26/91	Actual, will restore	TCI	Garden City, KS	500	Sports channel	Lost 1700 households. Moved to different satellite; should be restored to satellite and cable system late July, early August	Lost one PTV outlet

EXHIBIT C

Instances of Harm Reported by Public Television Stations

Call letters		Drop/shift	Date	Actual or threatened	Cable system name	Cable system location	Number of miles from broadcast to sys.	Replaced by what type of service	Manager's Comments: Describe harm to station	Manager's Comments: Describe harm to public
Threatened drops										
KVCR	San Bernardino	Drop	April 1989	Threat	Southland Cablevision	Redlands	1	BET	Learned in April they would be dropped in May. Station mounted campaign that averted drop.	One third of schedule is college telecourses for credit. One third of enrolled students would have been affected.
WTIU	Bloomington	Drop	Unknown	Threat; there is a reception problem that cable co. wants solved	Cardinal	Columbus	35	If dropped, would be replaced with WFYI (cable system too small to carry both)	This action has been threatened due to cable system inability to receive quality signal. WTIU is working on adding booster amplifier in Columbus area. Working with prof. engineer & legal firm to expedite. Have spent about $2,000 in fees.	
WTVS	Detroit	Drop	April 1991	Threat	Wyomark Cable	Adrian, MI	55		Acting on a tip from a viewer, station called the manager of the cable company. He wondered who had told WTVS, but said the station would not be dropped. He hadn't realized WTVS was on 24 hours a day and was pleased to know.	
KLCS	Los Angeles	Drop	1992	Threat				interconnected educational access channel		
KTEH	San Jose	Drop	11/1/89	Threat	Viacom	Marin City			Would have eliminated KTEH's signal to Marin City's viewers and members.	

EXHIBIT C

Instances of Harm Reported by Public Television Stations										
Call letters		Drop/shift	Date	Actual or threatened	Cable system name	Cable system location	Number of miles from headend to sta	Replaced by what type of service	Manager's Comments	
									Describe harm to station	Describe harm to public
Involuntary shifts to timesharing										
KOCE	Huntington Beach	Timeshare	July 1990	Actual	Simmons	Long Beach	15	independent financial		
New Hampshire Public Television		Shift to timeshare	Feb 1991	Actual	Continental Cablevision	Marlborough, MA	60	Timeshare w/ Boston Catholic		Lose unique programming, many viewers missed how-to programs on Saturday morning
WMVS	Milwaukee	Timeshare	June 1991	Actual	Jones Intercable	Wisconsin Rapids	120	Sports channel in prime time and weekends		
KTPS	Tacoma	Timeshare	in 1989	Actual	Viacom	Seattle		Timeshare with BET	Fewer viewers	Fewer program choices

EXHIBIT C

Instances of Harm Reported by Public Television Stations

Call letters / Actual shifts		Drop/shift	Date	Actual or threatened	Cable system name	Cable system location	Number of miles from headend to station	Replaced by what type of service	Manager's Comments: Describe harm to station	Describe harm to public
WLRN	Miami	Shift	June 1991	Actual	Sintet North	Dade County	0	Nostalgia, sports vision; shift from 20 to 39	Separated by 13 channels from other local broadcast station	Poor tech quality of signal on channel
WLRN	Miami	Shift	June 1991	Actual	Sintet	Broward County	100 yds	FNN; shift from 20 to 39		
KRCB	Rohnert Park	Shift	May 1991	Actual	MultiVision	Rohnert Park	2	Showtime	Loss of audience; less than 1 week notice	Confusion; loss of service for subscribers
WLAE	New Orleans	Shift	6/1/91	Actual	Cox Orleans	New Orleans	5	Discovery; shift from 32 to 14	Confusion of viewers	Price increase caused by tier restructuring
WQEX	Pittsburgh	Shift	Jan 1991	Actual	TCI	Pittsburgh	5		Terrible signal interference from over the air WQED. TCI refuses to do anything. Loss of viewers and underwriters	Not getting a clear signal in prime viewership area
WEDU	Tampa	Shift	March 1991	Actual	Paragon	Temple Terrace	6	JC Penney Shopping; shift from 4 to 2	Possible loss of revenues during March pledge	Many viewers confused
KRCB	Rohnert Park	Shift	5/30/91	Actual	Chambers	Novato, CA	10	San Jose independent	Loss of audience; no notice given prior to shift	Confusion; loss of service for subscribers
WLAE	New Orleans	Shift	June 1991	Actual	Cox Jefferson	Jefferson	10	Discovery; shift from 32 to 14	Confusion of viewers	Price increase caused by tier restructuring
KOCE	Huntington Beach	Shift	April 1989	Actual	Dimension	Laguna Niguel	20	ESPN; shift from 6 to 50		
WMFE	Orlando	Shift	1/26/91	Actual	CableVision of Central Florida	Orlando	20	Fox; shift from 3 to 2	Looking into Nielsen special report to show losses experienced.	
WLRN	Miami	Shift	June 1991	Actual	Storer South	Dade County	21	Nostalgia, sports vision; shift from 28 to 45		
WUCM/WUCX	University Center	Shift	July 1990	Actual	Cable Tec of Michigan	Sanford	25	QVC; shift from 11 to 32		
Mississippi ETV		Shift	Spring 1991	Actual	Star	Hernando	25	E Entertainment TV; shift from 2 to 10		Many viewers complain
WCEU	Daytona Beach	Shift	5/1/91	Actual	Palm Cable	Palm Coast, FL	30	Converter box	Not all viewers will receive station, confusion and detrimental to students taking telecourses.	
WNIT	South Bend	Shift	5/1/91	Actual	Jones Intercable	Three Rivers, MI	30	Switched positions with CBS	Cable boxes only go to 35; if don't have special box, can't receive station; planned to target this community for membership	
WNPB	Morgantown	Shift	6/1/91	Actual	Clarksburg Cable	Clarksburg WV	34	MTV; shift from 13 to 7	Viewers unable to locate WNPB on dial. Station was not given any notice of this switch. Many viewers contacted station; that's how we heard of change.	

EXHIBIT C

Instances of Harm Reported by Public Television Stations

Call Letters		Drop/shift	Date	Actual or threatened	Cable system name	Cable system location	Number of miles from headend to an	Replaced by what type of service	Manager's Comments: Describe harm to station	Describe harm to public
KAWE	Bemidji	Shift	Feb 1991	Actual	West Marc	Aitkin	35	TNT, shift from 24 to 4		
WCFE	Plattsburgh	Shift	in 1990	Actual	Adelphia ubile	Saranac Lake	40	ESPN, shift from 7 to 14		Confusion
WPBT	Miami	Shift	Jan 89	Actual	Comcast Cable	West Palm Beach	50	Shift from 13 to 24	Loss of membership revenue	

EXHIBIT C

Instances of Harm Reported by Public Television Stations

Call letters		Drop/shift	Date	Actual or threatened	Cable system name	Cable system location	Number of miles from headend to us	Replaced by what type of service	Manager's Comments: Describe harm to station	Describe harm to public
Shifts, restored										
KETC	St. Louis	Shift	Jan 1991	Actual, restored	TEC	St. Charles, MO	30	Weather channel, shift from 21 to 9	New system manager put us back on channel at his own initiative because he believed it was right.	
WTVP	Peoria	Shift	April 90	Actual, restored	NW Illinois TV Cable	Galesburg, Knoxville	55	Shifted from 12 to 29 for a few months, then BACK to 12, premium channel replaced	Second largest cable subscribers in viewing area. No notice	Subscribers unaware, schools not notified. Carl Sandburg College without service
WKYU	Bowling Green	Shift	in 1990	Actual, restored	Sonrer	Bowling Green County		WDCN, Nashville PTV station, shift from 11 to 4 and then BACK again	Corrected quickly	Confusion
KAID	Boise	Shift	8/1/90	Actual, restored April 1991 at KAID request	King Videocable	Twin Falls, ID	100	Family Channel	Loss of audience, subscribers, special services, station resources. New channel had severe interference problem which made the signal often unwatchable. AFTER MUCH WORK WITH THE CABLE SYSTEM MANAGER, THEY MOVED US BACK TO ORIGINAL CHANNEL 4/1/91.	
WOSU	Columbus	Shift	Sept 1991	Will be actual	Warner Cable	Columbus		Fox; shift from 8 to 7	WOSU has been on channel 8 for many years; Fox paid to be on same channel on all cable systems.	

[EXHIBIT 6]

PUBLIC TELEVISION STATIONS
MUST CARRY DROP/SWITCH MASTER LIST

Call Letters	Location	Drop or Shift?	Date	Cable system name	Cable system Location	Replaced by:	Harm	Restored?
CTPTV	CT	Drops when cable system was rebuilt	1988 & 1989	Greater New England Cablevision	Eastlong Meadow, MA		18% of prime time audience was from Massachusetts. Viewers deprived of unique programming source.	
Georgia Public Television	GA	Drop	2/1/90	First Cablevision	Peachtree City	TNT	Denied signal to 20,087 cable homes in signal area. 1800 of the households in the area were contributors to GPTV Cut off in-school broadcasts. Loss of local programming Required one person full time and others part-time one month to fight drop	Yes
Georgia Public Television	GA	Shift from 8 to 19	11/1/86	TCI	Athens		Shift was unannounced; station paid for ads; people complained about shift.	Yes
KAET	Phoenix, AZ	Shift	April 1989 (est.)	Max Tel Cable	Mesa			
KAWE	Bemidji, MN	Shift from 24 to 4	Feb. 1991	WestMarc	Aitkin	TNT	Poor technical quality of signal on channel	
KBDI	Boulder, CO	Shift		TCI	Boulder			
KBDI	Boulder, CO	Shift		TCI	Arapahoe City			
KBHE	Rapid City, SD	Shift from 10 to 30	1/1/87	TCI	Rapid City, Milbank and Sisseton		Station spent $2,000 to try to reverse shift.	
KBYU	Provo, UT	Shift from 11 to 25	3/1/87	TCI	Salt Lake City		Significant viewer confusion; numerous complaints received by KBYU, 30% decrease in viewership, significant resources were used in an attempt to restore KBYU to its original channel. Lost approx. 1000 members/$43,000	Yes after letter writing campaign
KCET	Los Angeles, CA	Shift		Dimension	San Marcos			
KCET	Los Angeles, CA	Shift	3/1/87	Communicom	Bellflower			
KCET	Los Angeles, CA	Shift	3/1/87	Communicom	Culver City			
KCET	Los Angeles, CA	Shift	6/27/88	Chambers	San Bernardino		16,000 subscriber households affected.	
KCET	Los Angeles, CA	Shift	Fall 1988	Buena Vision	Los Angeles		7,500 subscriber households affected.	
KCET	Los Angeles, CA	Shift	Apr 1989	King Cable	Tujunga		23,000 subscriber households affected.	
KCET	Los Angeles, CA	Shift	11/1/87	Yorba Linda Cable	Yorba Linda		7,600 subscriber households affected.	
KCET	Los Angeles, CA	Shift from 6 to 19	1st Q '87	Cablevision	Sierra Madre		Poor reception characterized by constant greying out, lines across screen and static.	
KCKA	Centralia, WA	Shift		TCI	Olympia			
KCSM	San Mateo, CA	Drop	12/30/86	TCI	San Mateo			
KCSM	San Mateo, CA	Drop	Aug. 1986	Viacom	Pittsburgh			Partial, complete restoration 4 years later
KCSM	San Mateo, CA	Drop	Feb. 1986	Western Com.	Concord	Access Channel		
KCSM	San Mateo, CA	Drop	Aug. 1986	Viacom	San Francisco	Discovery	Lost more than one half of its paying enrollment for college level courses; lost 15-20% of its San Francisco subscribers; revenue loss of $90,000 a year.	Yes, 4 years later.
KCSM	San Mateo, CA	Drop	12/30/86	TCI	Millbrae			
KCSM	San Mateo, CA	Drop	3/1/89	Viacom	Marin	KRCB	After the 1989 Viacom drops in this and other locations, station went from #2 PTV in market to #3.	Yes, pursuant to must carry.
KCSM	San Mateo, CA	Drop	3/1/89	Viacom	Dublin	KRCB	After the 1989 Viacom drops in this and other locations, station went from #2 PTV in market to #3.	Yes, pursuant to must carry.

PUBLIC TELEVISION STATIONS
MUST CARRY DROP/SWITCH MASTER LIST

Call Letters	Location	Drop or Shift?	Date	Cable system name	Cable system Location	Replaced by:	Harm	Restored?
KCSM	San Mateo, CA	Drop	3/1/89	Viacom	American Canyon		After the 1989 Viacom drops in this and other locations, station went from #2 PTV in market to #3.	Yes, pursuant to must carry
KCSM	San Mateo, CA	Drop	3/1/89	Viacom	Pinole	KRCB	After the 1989 Viacom drops in this and other locations, station went from #2 PTV in market to #3.	Yes, pursuant to must carry
KCSM	San Mateo, CA	Drop	3/1/89	Viacom	Conta Costa Co	Shopping Channel	After the 1989 Viacom drops in this and other locations, station went from #2 PTV in market to #3.	
KCSM	San Mateo, CA	Drop	3/1/89	Viacom	Napa	Shopping Channel	After the 1989 Viacom drops in this and other locations, station went from #2 PTV in market to #3.	Yes, pursuant to must carry
KCSM	San Mateo, CA	Drop	Sept. 1989	Bay Cable	Berkeley	Discovery		Yes, pursuant to must carry
KCSM	San Mateo, CA	Timeshare	3/1/89	Viacom	Pittsburg			Yes
KCSM	San Mateo, CA	Drop	Sept. 1989	TCI	Alameda, Hayward, San Leandro, Castro			
KCSM	San Mateo, CA	Drop	6/9/86	felevents	Martinez		Cut KCSM off from 12-15% of East Bay supporters	
KCWC	Riverton, WY	Shift	prior to	TCI	Lancer			
KDSD	Aberdeen, SD	Shift from 13 to 17	1/1/87	TCI	Sisseton		Lost 12 members and $480 in revenues	
KENW	Portales, NM	Shift from 5 to 33	1/1/87	TCI	Hobbs			Shifted back to ch. 6
KESD	Brookings, SD	Drop	Spring 1988	North American	Ivanhoe MN			
KETC	St. Louis, MO	Shift from 21 to 9	Jan. 1991	TEC	St. Charles, MO	Weather Channel	Subscribers, schools not notified.	Yes
KETC	St. Louis, MO	Shift	prior to	Cencom	Fenton			Yes
KETC	St. Louis, MO	Shift	prior to	TCI	St. Peters			
KETC	St. Louis, MO	Shift from 9 to 20		Cablevision	Clinton			
KETC	St. Louis, MO	Shift from 9 to 13		Cablevision	St Clair			
KETC	St. Louis, MO	Shift from 9 to 10	Dec. 1987	Cencom	Black Jack/Florissant			
KETC	St. Louis, MO	Shift from 9 to 33	Dec. 1987	Continental Cable	St. Louis/ Overland			
KETC	St. Louis, MO	Shift from 9 to 23	Dec. 1987	Great Plains Cable	St. Louis/ Kinlock			
KETC	St. Louis, MO	Shift from 9 to 14	Dec. 1986	TCI	St. Charles	Lifetime		
KETC	St. Louis, MO	Shift from 9 to 26	Jan. 1991	TCI	St. Louis/ Hazelwood			
KFME	Fargo, ND	Shift from VHF tier to higher	1/1/87	TCI	Moorhead, MN; Minot, Williston, Grand Forks		Viewer confusion. approx. 10% of membership was affected, station moved off channel. some viewers had to buy converters.	Yes
KGFE	Grand Forks, ND	Shift from 13 to 23	Jan. 1987	TCI	Grand Forks		After many complaints shift was reversed; many homes, nursing homes and Univresity of North Dakota could not receive KGFE during the switch.	
KHNE	Hastings, NE	Shift		TCI	Hastings			
KHNE	Hastings, NE	Shift		TCI	Grand Island			
KIIN	Iowa City, IA	Shift from 12 to 18	6/1/87	TCI	Cascade		Contributions dropped after shift.	
KIIN	Iowa City, IA	Shift from 12 to 18	6/1/87	TCI	Dyersville		Contributions dropped after shift.	
KIIN	Iowa City, IA	Shift from 12 to 18	6/1/87	TCI	Epworth		Contributions dropped after shift.	
KIIN	Iowa City, IA	Shift from 12 to 18	6/1/87	TCI	Farley		Contributions dropped after shift.	
KIIN	Iowa City, IA	Shift from 12 to 3	Feb. 1989	Westmark TCI	Bloomfield		Subscribers complained of poor reception and ghosting problems.	
KIXE	Redding, CA	Shift		Viacom	Oroville			Yes

PUBLIC TELEVISION STATIONS
MUST CARRY DROP/SWITCH MASTER LIST

Call Letters	Location	Drop or Shift?	Date	Cable system name	Cable system Location	Replaced by:	Harm	Restored?
KLCS	Los Angeles, CA	Shift from 19 to 29	Fall 1988	King Video	Sunland/ Tujunga	Share w/ music channel.		
KLCS	Los Angeles, CA	Drop	Dec. 1988	Cablevision	Chatsworth		Inability to reach schools, teachers and administrators in area; elimination or severe curtailment of K-12 programs.	
KLCS	Los Angeles, CA	Drop	Dec. 1988	Cablevision	Calabasas		Inability to reach schools, teachers and administrators in area, elimination or severe curtailment of K-12 programs.	
KLCS	Los Angeles, CA	Drop	Dec. 1988	King	Burbank (Glendale)		Inability to reach schools, teachers and administrators in area; elimination or severe curtailment of K-12 programs.	
KLCS	Los Angeles, CA	Drop	Dec. 1988	Cablevision	Ventura		Inability to reach schools, teachers and administrators in area; elimination or severe curtailment of K-12 programs.	
KLCS	Los Angeles, CA	Shift	Prior to Jun. 1988	Century	Los Angeles			
KLCS	Los Angeles, CA	Shift		United	Los Angeles			
KLCS	Los Angeles, CA	Shift from 26-38	Aug. 1988	Century Cable	BelAir/ BevHills			
KLCS	Los Angeles, CA	Shift	1/1/89	American Cable System	Westchester			
KLCS	Los Angeles, CA	Shift from 33 to 54	1/1/89	Century Marina	Marina Del Ray			
KLCS	Los Angeles, CA	Shift from 48-58	1/1/89	Insight	Claremont			
KLCS	Los Angeles, CA	Shift from 84-142	1/1/89	Jones Intercable	Lakewood			
KLCS	Los Angeles, CA	Shift	Feb. 1988 (est.)	Dimension/ Times Mirror	Palos Verdes, San Pedro			
KLNE	Lexington, NE	Shift		TCI	McCook			
KMOS	Sedalia, MO	Drop	Mid 1980s	Douglas Cable	LaMont, Higginsville, Concordia		Schools forced to use alternative means of receiving instructional programming.	
KMOS	Sedalia, MO	Drop	Mid 1980s	Cable-Video Ent.	Lexington		Schools forced to use alternative means of receiving instructional programming.	
KMTP	San Francisco, CA	Drop	Summer 1992	Viacom	Marin County		Lost 35% of their funding - station actually put off the air for a couple of months	No; complaint pending at the FCC.
KOAC	Corvallis, OR	Shift from 7 to 27	12/1/86	TCI	Eugene		Customer confusion; need for converters - some VCRs cannot tape higher channel. Substantial criticism from viewers, newspaper articles forced cable system to return KOAC to ch. 7.	Yes, after couple of weeks - several 100 letters of protest.
KOCE	Huntington Beach, CA	Drop	1989	Sammons	Glendale	TNT, Prime Ticket	Deprived of unique programming source.	No
KOCE	Huntington Beach, CA	Timeshare	7/1/90	Sammons	Long Beach	Independent financial channel		Yes
KOCE	Huntington Beach, CA	Shift from 6 to 50	4/1/89	Dimension	Laguna Niguel	ESPN	Required expenditure of station resources to obtain restoration.	Yes

PUBLIC TELEVISION STATIONS
MUST CARRY DROP/SWITCH MASTER LIST

Call Letters	Location	Drop or Shift?	Date	Cable system name	Cable system Location	Replaced by:	Harm	Restored?
KOCE	Huntington Beach, CA	Drop	9/3/85	Southland CBV (now UAE)	Redlands		Lost viewers.	
KOCE	Huntington Beach, CA	Drop	1987 (est.)	American CBV (now served by Continental Cablevision)	Pomona		Lost viewers.	Yes
KOCE	Huntington Beach, CA	Drop	1987 (est.)	American CBV	Inglewood		Lost viewers.	Yes
KOCE	Huntington Beach, CA	Drop	1987 (est.)	American CBV (now served by Continental Cablevision)	Carson		Lost viewers.	
KOCE	Huntington Beach, CA	Drop	Jun. 1988	Multivision	Hermosa Beach			
KPSD	Eagle Butte, SD	Drop	Spring 1988	Mid-Continent CBV	Hettinger ND			
KPTS	Wichita, KS	Shift from 8 to 28	Nov. 1988	Salina Cable	Salina			
KQEC (now KMTP)	San Francisco, CA	Drop	12/30/86	TCI	Fremont			
KQEC (now KMTP)	San Francisco, CA	Drop	Nov. 1986	H. Cablevision	Santa Clara	A&E		
KQEC (now KMTP)	San Francisco, CA	Drop	12/30/86	TCI	Sunnyvale			
KQEC (now KMTP)	San Francisco, CA	Drop	12/30/86	TCI	San Mateo			
KQEC (now KMTP)	San Francisco, CA	Drop	Sept. 1986	TCI	Pleasant Hills	American Movie Classics		
KQEC (now KMTP)	San Francisco, CA	Drop	Apr. 1987	United	Cupertino	CNN News		
KQED	San Francisco, CA	Shift		TCI	Oakland		714 members dropped; approx. $25,000 lost; $3,200 spent trying to reverse shift.	
KRCB	Rohnert Park, CA	Shift from 11 to 22	May 1991	MultiVision	Rohnert Park	Showtime	Less than 1 week notice. Confusion; loss of service for subscribers.	No
KRCB	Rohnert Park, CA	Shift from 36 to 33	5/30/91	Chambers	Novato, CA	San Jose independent	Loss of audience; no notice given prior to shift. Confusion, loss of service for subscribers. Price increase caused by tier restructuring.	
KRCB	Rohnert Park, CA	Shift from 11 to 22	Early 1988	ML Media	Rohnert Park		Converters necessary	
KSIN	Sioux City, IA	Shift from 11 to 9	Fall 1988	Sooland Cable	Sioux City		Subscribers complained about interference.	
KSMQ	Austin, MN	Shift from 8 to 48	Fall 1988	Jones Intercable	Owatonna		Viewership dropped; auction suffered.	Moved to ch. 23 after pressure exerted - early 1990s.
KTCI	St. Paul, MN	Shift		Continental Cable	St. Paul			
KTCI	St. Paul, MN	Timeshare	Dec. 1986	Rogers Cable	Minneapolis			

PUBLIC TELEVISION STATIONS
MUST CARRY DROP/SWITCH MASTER LIST

Call Letters	Location	Drop or Shift?	Date	Cable system name	Cable system Location	Replaced by:	Harm	Restored?
KTEH	San Jose, CA	Drop	12/30/87	TCI	Sunnyvale	Discovery	Viewers complained of "reduced access to local matters." Lost approx. 150 members and $11,000 in revenues.	
KTEH	San Jose, CA	Drop	June 1987	TCI	Fremont	Discovery	Lost at least $4,400 in donations.	
KTEH	San Jose, CA	Drop	Dec. 1986	TCI	Daly City		Lost several members and approx. $800 in revenues.	
KTEH	San Jose, CA	Drop	Dec. 1986	Group W	Scotts Valley			
KTEH	San Jose, CA	Drop	12/30/87	TCI	San Carlos	Home Shopping	Morning adult education programming dropped, lost members and at least $1,200 with donations.	
KTEH	San Jose, CA	Drop	6/11/88	TCI	San Carlos, Redwood City		Loss of members who were unable to get KTEH. Lost at least $5,300 in revenue.	
KTNE	Lincoln, NE	Shift from 4 to 21	11/1/87	Sidney Cable	Sidney	Denver PTV	Loss of local programming from first tier.	Yes-on ch.4 about 3/89.
KTNE	Lincoln, NE	Shift from 8 to 28	6/10/09	TCI	Alliance		Viewer complaints; viewers charged for converter boxes.	Yes
KTNW	Richland, WA	Shift from 10 to 31	1/1/90	United Artist Cable	Pasco, Kennewick			
KTPS (now KBTC)	Tacoma, WA	Timeshare	1989	Viacom	Seattle			
KTPS (now KBTC)	Tacoma, WA	Shift	Prior to 6/88	TCI	Bremerton			Yes
KTPS (now KBTC)	Tacoma, WA	Shift	Prior to 6/88	TCI	Seattle			Yes
KTPS (now KBTC)	Tacoma, WA	Shift		Viacom	King, Snohomish			
KTSC	Pueblo, CO	Shift		TCI	Pueblo			Yes
KTWU	Topeka, KS	Drop	4/1/86	Cablevision	Hiawatha	KCPT (Missouri)	Viewers lost access to many Kansas-oriented programs. Estimated loss could be as high as 4,000 dollars/year from 94 members in Hiawatha.	Yes
KTWU	Topeka, KS	Drop	Jun. 1986	Multimedia	Herington			
KTWU	Topeka, KS	Drop	9/14/87	Amer Cablevision	Ft. Leavenworth	Shopping Channel	Schools lost science program in mid-semester. Lost approx. 40 members and $1,500 in revenues.	
KTWU	Topeka, KS	Drop	Fall 1988	Douglas Cable	Horton			Yes, after 2 weeks.
KTWU	Topeka, KS	Shift from 10 to 36		Douglas Cable	Shawnee County		Lost viewership; many people called to complain.	Yes, after 1992.
KTWU	Topeka, KS	Drop	7/1/89	American CBV	Ft. Leavenworth		Lost approx. 100 members/ average annual pledge of about $35.	
KTWU	Topeka, KS	Shift from 11A to 5A	Summer 1986	Telecable	Overland Park		Interference problems from KCTV ch. 5; signal more difficult to receive. Lost approx. 288 members and $12,096 in contributions; loss of identity with on-air channel number.	no
KTWU	Topeka, KS	Shift from 10 to 8	12/1/86	TCI	Topeka		Loss of viewership.	
KUED	Salt Lake City, UT	Shift from 7 to 25	1986 or 1987	TCI	Provo		Lost approx. 150 subscribers and $6,000 in revnue; station moved off channel.	
KUHT	Houston, TX	Shift	7/1/88	Prime Cable of Katy	Katy			
KUHT	Houston, TX	Shift	7/1/88	Prime of Pasadena	Pasadena			
KUID	Boise, ID	Shift	Fall 1986	TCI	Lewiston		Station moved off channel; subscribers required to buy a converter.	

PUBLIC TELEVISION STATIONS
MUST CARRY DROP/SWITCH MASTER LIST

Call Letters	Location	Drop or Shift?	Date	Cable system name	Cable system Location	Replaced by:	Harm	Restored?
KULC	Ogden, UT	Shift from 14 to 36	2/14/89	TCI	Salt Lake/Ogden	Commercial channel		
KUON	Lincoln, NE	Shift from 12-20	Sept 1988	Cox Cable	Omaha			
KVCR	San Bernardino, CA	Drop	1/1/84	Comcast	Ontario, Calif			Yes - 1992
KVIE	Sacramento, CA	Drop	May 1987	ML Media	Fairfield		Lost approx 70 subscribers and $3,350	
KWSE	Williston, ND	Shift	Prior to	TCI	Williston			
KWSU	Pullman, WA	Shift		TCI	Lewiston			
KYNE	Omaha, NE	Drop		United	Bellevue	KDIN (PTV)		
KYVE	Yakima, WA	Drop	2/24/87	TCI	Wenatchee	Satellite Channels	Local programming no longer available	
Louisiana Public Broadcasting	LA	Drop	10/4/90	St Charles Cable TV	Luling, LA		4000 viewers unable to receive college credit, high school equiv training & other literacy programs as well as other educational benefits offered by LPB	No
Mississippi ETV	MS	Drop	6/30/91	Storer (now owned by TCI)	Fairhope, AL	Mind Extension University, Encore, BET, Court TV		No
Mississippi ETV	MS	Shift from 2 to 10	Spring 1991	Star	Hernando	E! Entertainment TV	Many viewers complained. Lack of clear signal in prime viewership area	
WBGU	Bowling Green, OH	Shift from 12 to 30		Heritage	Pauldine		Lost a few members, approx. $320 in membership income lost	
WBGU	Bowling Green, OH	Shift from 8B to 24B		Buckeye	Toledo			
WBGU	Bowling Green, OH	Shift from 6 to 32		Heritage	Bryan			(?)
WBGU	Bowling Green, OH	Shift from 12 to 30		Heritage	Van Wert		Lost 42 members and approx. $1,700.	
WBGU	Bowling Green, OH	Shift from 12 to 31		Heritage	Celina			
WCBB	Augusta, ME	Drop	3/31/90	Cable TV of Kennebunk	Kennebunk	Family Channel	Loss of approx. $20,000; 300 members in the area.	
WCBB	Augusta, ME	Drop	1988	Cablevision	Saco, Old Orchard Beach	51 Portland	Lost approx. 150 members and $7,500 in membership donations. Lost foundation support. Loss of local public affairs programming. $5,000 spent to correct drop.	Yes, in 1989.
WCET	Cincinnati, OH	Drop	4/1/88	Viacom	Dayton	WPTD/ Discovery Channel	Loss of instructional programs and local companion documentaries to Project Literacy Outreach program.	
WCET	Cincinnati, OH	Drop	12/31/88	Viacom	Dayton			
WCET	Cincinnati, OH	Drop	12/1/88	ContinentalCBV	Dayton			
WCEU	Daytona Beach, FL	Shift	5/1/91	Palm Cable	Palm Coast, FL		Not all viewers will receive station, confusion to viewers. Detrimental to students taking telecourses.	

PUBLIC TELEVISION STATIONS
MUST CARRY DROP/SWITCH MASTER LIST

Call Letters	Location	Drop or Shift?	Date	Cable system name	Cable system Location	Replaced by:	Harm	Restored?
WCFE	Plattsburgh, NY	Shift from 7 to 14	1/2/90	Adelphia Cable	Saranac Lake	ESPN	Confusion, loss of service for subscribers	
WCFE	Plattsburgh, NY	Drop/then shift	Feb. 1987	TCI	St. Albans	WETK (PTV)	Loss of unique educational programming	
WCMU	Mt. Pleasant, MI	Shift	Prior to	Gerity	Bay City			
WCVE	Richmond, VA	Shift from 9 to 32		Storer	Chesterfield			
WCVW	Richmond, VA	Shift from 10 to 34		Storer	Chesterfield			
WEDH	Hartford, CT	Drop	3/1/87	Comcast	Danbury	Lifetime		
WEDH	Hartford, CT	Drop	Feb. 1987	Pioneer	Palmer	MTV		
WEDU	Tampa, FL	Shift from 4 to 2	March 1991	Paragon	Temple Terrace	JC Penney Shopping	Possible loss of revenues during March pledge. Many viewers confused. Price increase caused by tier restructuring	
WEDW	Bridgeport, CT	Drop	Nov. 1986	Rogers USA	New Rochelle	C-Span		
WEDW	Bridgeport, CT	Drop	4/1/87	Times Mirror	Riverhead	Lifetime		
WENH	Durham, NH	Drop	Nov. 1986	Warner	Lynn		Programming not available on other stations. Dozens of dues-paying members in the area upset.	
WENH	Durham, NH	Drop		Times-Mirror	Haverhill			Yes, March 1987
WENH	Durham, NH	Shift		Times-Mirror	Haverhill		Required subscribers to buy a converter.	
WENH	Durham, NH	Shift from 11 to 25	12/1/87	James Communications	Springfield		Poor reception, replaced by CNN.	
WETA	Washington, DC	Drop, then shift	Apr. 1986	Comcast Cable	Baltimore County		Soon after station was dropped it was reinstated but on the public access channel which it had to share.	
WETK	Burlington, VT	Shift from 20 to 26	Approx. 8/91	Cablevision	St. Albans			
WFUM	Flint, MI	Shift		TCI	Saginaw			
WFYI	Indianapolis, IN	Shift from 20 to 21	1/2/91	American Cablevision	Indianapolis		80,000 subscribres affected.	
WFYI	Indianapolis, IN	Drop	June 1991	New Castle Cable	New Castle, IN (now TCI of Indiana)	Encore and Court TV	Loss of school contact and service. Loss of audience, viewers and members. Loss of unique programming	No
WFYI	Indianapolis	Shift from 2 to 21	Sept. 1988	Dimension	Lafayette			
WGBH	Boston, MA	Drop	12/1/89	Chesterfield Cablevision	Keene, NH		Loss of audience/subscribers and full service PTV.	
WGBX	Boston, MA	Timeshare	6/1/88	Heritage Cablevision	Lincoln, RI		58,000 subscribers in Rhode Island and Massachusetts affected.	No
WGBY	Springfield, MA	Drop	3/1/87	Comcast	Middletown	Spanish Station		
WGBY	Springfield, MA	Shift, Timeshare with 2 other stations.	August, 1986	United Cable of Connecticut	Hartford County	WGBY made to share with two Springfield commercial stations	Confusion in public perception about the nature of public broadcasting. Viewer confusion as to There were more than 1500 WGBY members in the 21 communities affected.	
WGTE	Toledo, OH	Drop	1/1/91	Clear Cablevision	Saline, MI		160 WGTE members lived in Saline area, representing $9,300 in annual contributions.	
WGTE	Toledo, OH	Shift from 30-56	7/1/88	United Cable TV	Woodhaven			
WGTV	Atlanta, GA	Shift from 8 to 19	11/1/86	TCI	Athens		Viewers required a new converter; some viewers complained to cable system.	Yes, after complaints

PUBLIC TELEVISION STATIONS
MUST CARRY DROP/SWITCH MASTER LIST

Call Letters	Location	Drop or Shift?	Date	Cable system name	Cable system Location	Replaced by:	Harm	Restored?
WGTV	Atlanta, GA	Shift	Prior to	Prime	Atlanta			
WGVU	GrandRapids, MI	Shift		Tait Cable	South Haven			
WHA	Madison, WI	Shift	Prior to	Jones Intercable	Janesville			
WHMM	Washington, DC	Shift from 13 to 38	1986-1987	Comcast	Baltimore			
WHMM	Washington, DC	Shift from 29 to 36		Arlington Metrocable	Arlington, VA			
WHRM	Wausau, WI	Shift from 2 to 26	4/4/88	Jones Wausau	Wausau		Schools had hard time getting a clear picture.	Yes, pursuant to must carry
WHRO	Norfolk, VA	Shift		Cox	Norfolk			
WILL	Urbana, IL	Drop	4/23/87	TCI	Herscher	WTTW(PTV)		
WILL	Urbana, IL	Drop	Dec. 1986	Liberty	Charleston			
WIPB	Muncie, IN	Drop	6/1/91	TCI	Alexandria and Elwood		Loss of full PTV service, 12,00 to 15,00 viewers affected, no notice given	Yes, after must carry
WIPB	Muncie, IN	Drop	4/10/91	Jones Spacelink	Bluffton	USA	Loss of subscribers, PBS service and local broadcast service	
WIPB	Muncie, IN	Shift from 13 to 19 to 29	1988 or 1989	TCI	Richmond		Before the shift station had 300 members in the area, after the shift only 150 members.	
WJCT	Jacksonville, FL	Drop	4/1/91	Palm Cable	Palm Coast	College station w/ instructional programming	Potential revenue loss of $14,000 per year. Loss of programs relevant to viewers. Note: An aggressive member campaign and face-to-face meeting with cable co & parent co required before resoration. Loss of regional PBS station w/close ties to area.	Yes
WJCT	Jacksonville, FL	Shift to higher channel, 32	Jan. 1987	Cablevision	Palatka	Home Shopping Network	Lost approx. 45 members and $2,450. Spent $4,000 in campaign to reverse shift; viewers needed a converter.	
WKAR	East Lansing, MI	Drop	June 1991	WestMarc (TCI)	Battle Creek, MI	Encore; rearranged system for extended basic tier	Station had 592 members in area before drop. One year later, had only 30. Loss of local program production including state-oriented programming, loss of programming to classrooms.	Yes, pursuant to must carry
WKAR	East Lansing, MI	Drop	5/1/86	Columbia	Ann Arbor and Ypsilanti	DNK		Yes, 1991
WKAR	East Lansing, MI	Drop	2/1/87	Wolverine	Battle Creek	WTBS	Loss of access by 22,000 subscribers.	Yes
WKLE	Lexington, KY	Shift to 46	Approx. 1/87	Centel	Richmond			
WKLE	Lexington, KY	Shift to 15		TCI	Winchester		Schools objected.	
WKMA	Madisonville, KY	Shift from 10 to 17		TCI	Henderson		Shift was without prior notice; schools affected.	
WKMR	Morehead, KY	Shift from 11 to 22		Pardigm	Grayson		No notice given; schools affected.	
WKNO	Memphis, TN	Drop	5/1/91	Star Cable	Hernando, MS	Mississippi ETV; E! Entertainment TV added	Loss of local service.	

Call Letters	Location	Drop or Shift?	Date	Cable system name	Cable system Location	Replaced by:	Harm	Restored?
WKYU	Bowling Green, KY	Shift from 11 to 4	In 1990	Storer	Bowling Green County	WDCN, Nashville PTV station	Corrected quickly but still caused viewer confusion.	Yes
WLIW	Plainview, NY	Shift from 14 to 24	6/3/88	TKR	Rockland Co.			
WLRN	Miami, FL	Shift from 20 to 39	June 1991	Storer North	Dade County	Nostalgia, Sportsvision	Separated by 13 channels from other local broadcast stations. Poor technical quality of signal on channel.	
WLRN	Miami, FL	Shift from 20 to 39	June 1991	Storer	Broward County	FNN	Separated by 13 channels from other local broadcast stations. Poor technical quality of signal on channel.	
WLRN	Miami, FL	Shift from 28 to 45	June 1991	Storer South	Dade County	Nostalgia, sports vision, shift from 28 to 45		
WLRN	Miami, FL	Drop	Dec. 1985	Cablevision [Adelphia Cable and Miami TCI]	Miami	DNK	Public pressured cable system to restore.	Yes, one week later.
WLRN	Miami, FL	Shift from 17 to 26	6/1/88	Miami Cablevision/TCI	Miami	Showtime	Lost many viewers and subscribers.	
WLRN	Miami, FL	Drop	12/1/86	Selkirk	Ft. Lauderdale	Nickelodeon	Substantial drop in audience.	
WLRN	Miami, FL	Shift	Prior to	Storer	North Miami		Loss of audience.	
WMFE	Orlando, FL	Shift from 3 to 2	1/26/91	CableVision of Central Florida	Orlando	Fox	Shift caused a very bad ghosting problem. Many viewers complained.	
WMHT	Schenectady, NY	Drop	Apr. 1988	Charlemont	Readsboro, VT		Lost viewers.	
WMHT	Schenectady, NY	Shift	Prior to 6/88	Cablevision	Albany			Yes
WMHT	Schenectady, NY	Shift from 35-37	Sept. 1987	Jones Intercable	Glenville, Saratoga			
WMHX (now WMHQ)	Schenectady, NY	Drop	Feb. 1988	Cablevision	Glens Falls	CNN		
WMVS	Milwaukee, WI	Shift	Prior to	Jones Intercable	West Allison			
WMVT	Milwaukee, WI	Shift	4/1/88	Paragon Cablevision	Milwaukee			
WMVT	Milwaukee, WI	Shift	11/28/88	Viacom	Greenfield			
WNED	Buffalo, NY	Shift	pre-1987	TCI	Buffalo		Station spent $20,000 on campaign to reverse shift; sunscribers required to buy converters.	Yes, after protests.
WNIN	Evansville, IN	Drop	2/1/91	Loogootee Cable (now Tele-Media Co of the Mid-South)	Loogootee, IN	CNN Headline News and local access added to system	Loss of revenue and full PTV service; lost 75 members.	Yes, pursuant to must carry.
WNIN	Evansville, IN	Drop	Jan. 1986	Century Comm.	Owensboro, KY	CBN	Viewers upset. Station received as many as 200 calls per day.	Yes. Within 3 weeks, pursuant to viewer pressure.

PUBLIC TELEVISION STATIONS
MUST CARRY DROP/SWITCH MASTER LIST

Call Letters	Location	Drop or Shift?	Date	Cable system name	Cable system Location	Replaced by:	Harm	Restored?
WNIN	Evansville, In	Drop	Jan. 1989	Douglas Cable	Bone Gap, Browns, Keensburg, and Allendale			
WNIN	Evansville, IN	Shift from 10 to 18	1/16/87	TCI	Owensville		Station put on secondary inferior channels, station lost membership	
WNIN	Evansville, IN	Shift from 9 to 24	1/16/87	TCI	Boonville		Station put on secondary inferior channels, station lost membership	
WNIN	Evansville, IN	Shift from 5 to 27	1/1/87	TCI	Mt Vernon		Station put on secondary inferior channels, station lost membership	
WNIN	Evansville, IN	Shift from 9 to 18	1/16/87	TCI	Princeton		Station put on secondary inferior channels, station lost membership	Yes
WNIN	Evansville, IN	Shift from 9 to 24	1/16/87	TCI	Jasper		Station put on secondary inferior channels, station lost 172 members and approx. $10,000	
WNIN	Evansville, IN	Shift from 9 to 19	Feb. 1989	Star Cable	Evansville, Wadesville, Poseyville		Station put on secondary inferior channels, station lost membership	Yes, pursuant to must carry
WNIT	South Bend, IN	Shift from 10 to 39	5/1/91	Jones Intercable	Three River, MI	Commercial station	Put station outside reach of standard cable box	
WNJM	Montclair, NJ	Drop	April 1987	Paragon	Manhattan	ESPN		
WNJM	Montclair, NJ	Drop	12/1/87	American Cablesystems	Ossining			Yes
WNJM	Montclair, NJ	Shift		UA-Columbia	Oakland		Shifted to channel that schools could not receive.	
WNJM	Montclair, NJ	Shift from 8 to 34	Sept. 1988	TKR Montvale	Montvale			
WNJS	Camden, NJ	Drop	Dec. 1986	Harron	Millville		WNJS was the only provider of daytime instructional television. Spent $600 trying to reverse drop.	
WNJS	Camden, NJ	Drop		TCI	Wildwood		Spent $1,500 trying to reverse drop.	
WNJT	Trenton, NJ	Drop	1986 (est.)	Lower Bucks	Levittown			
WNJT	Trenton, NJ	Shift		Comcast	Trenton		Schools had hard time finding station.	
WNPB	Morgantown, WV	Shift from 8 to 24	4/5/90	Century Cable	Morgantown, WV		Nearly 4000 students were affected as only 20 of the 500 TV sets used had converters. Programming lost even though service had been paid for by Bd of Ed. Station spent time and $10,000 to $15,000 informing viewers of shift.	Yes
WNPB	Morgantown, WV	Shift from 13 to 7	6/1/91	Clarksburg Cable	Clarksburg, WV	MTV	No notice given. Viewers unable to locate WNPB on dial.	Yes
WNPB	Morgantown, WV	Drop	Sept. 1986	Helicon Cablevision	Uniontown, PA	CNN	Lost viewers; constributors.	
WNPB	Morgantown, WV	Shift from 8 to 20	6/10/87	Wheeling Cable/TCI	Wheeling		46% drop in membership; 36% drop in revenue during March 1987 pledge drive.	
WNSC	Rock Hill, RI	Drop		Vision	Albemarle		Programming geared to international community lost; lost 33% of viewership and estimated $10,000 in membership fees.	Yes
WNVC	Fairfax, VA	Drop	1/1/87	Hauser Comm. (now Cable TV Arlington)	Arlington	CNN	Loss of only television source of programming in numerous foreign languages for Arlington. Loss of programming relating to Virginia General Assembly.	
WNVC	Fairfax, VA	Shift from 19 to 34		Jones Intercable	Alexandria			

Call Letters	Location	Drop or Shift?	Date	Cable system name	Cable system Location	Replaced by:	Harm	Restored?
WNVT	Goldvein, VA	Shift from 32 to 19		Jones Intercable	Alexandria			
WNYC	New York, NY	Drop	Sept. 1986	Suburban	East Orange			
WNYC	New York, NY	Drop	7/1/86	Sammons	Dover			
WNYC	New York, NY	Drop		Commonwealth	Carmel	WTZA		
WNYC	New York, NY	Shift from 24 to 42	Dec. 1988	Cablevision	Great Neck	Pay per view		
WNYC	New York, NY	Timeshare	Jan. 1988	Orange City CV	Wurstboro			
WNYC	New York, NY	Shift	Apr. 1988	TKR	Metuchen	Share w/Sports ch & Travel Ch		
WNYC	New York, NY	Drop	June 1986	Harte-Hanks	Ocean Township			
WNYE	New York, NY	Drop	Jan. 1986	United Artists	Wayne	Weather Channel		
WNYE	New York, NY	Drop	7/1/86	Sammons	Morristown	CNN		
WNYE	New York, NY	Drop		TKR Cable	Rockland			
WOSU	Columbus, OH	Shift from 8 to 7	Sept. 1991	Warner Cable	Columbus	Fox	WOSU lost well-established channel placement.	Yes
WOSU	Columbus, OH	Shift	Prior to	Times-Mirror	Coshocton			
WOUB	Athens, OH	Drop	Apr. 1986	Consolidated	Pt. Pleasant, WV; Gallipolis, Pomeroy, Middleport, Syracuse, and Salisbury, Ohio			Yes
WOUB	Athens, OH	Shift		TCI	Parkersburg		Affected in-school service.	
WOUC	Cambridge, OH	Drop		TCI	Winterville	Discovery		
WOUC	Cambridge, OH	Shift	Prior to	TCI	Holloway			
WOUC	Cambridge, OH	Shift	Prior to	TCI	Hopedale			
WOUC	Cambridge, OH	Shift	Prior to	TCI	Dillonvale			
WOUC	Cambridge, OH	Shift	Prior to	TCI	Cadiz			
WOUC	Cambridge, OH	Shift	Prior to	TCI	Shadyside			
WOUC	Cambridge, OH	Shift	Prior to	TCI	Glencoe			
WOUC	Cambridge, OH	Shift	Prior to	TCI	Barnesville			
WOUC	Cambridge, OH	Shift	Prior to	TCI	Bellaire			
WOUC	Cambridge, OH	Shift	Prior to	TCI	Jewett			
WOUC	Cambridge, OH	Shift	Prior to	TCI	Fushing			
WOUC	Cambridge, OH	Shift	Prior to	TCI	Bethesda			
WOUC	Cambridge, OH	Shift	Prior to	TCI	Martins Ferry			
WPBT	Miami, FL	Drop (in some areas)	Oct. 1988 & 10/1/1990	National Cable	Lake Worth		$6000 of Station resources diverted to fight drop; loss of members, loss of revenue.	Yes
WPBT	Miami, FL	Sh ft from 13 to 24	Jan. 1989	Comcast Cable	West Palm Beach		Loss of membership revenue.	
WPBY	Huntington, WV	Shift	Prior to	Cablevision	Charleston			
WPTO	Oxford, OH	Drop	Summer 1990	Storer [Now served by TKR Cable Co.]	Newport, KY		Loss of local broadcast source to cable viewers.	Yes, pursuant to must carry
WQEX	Pittsburgh, PA	Shift	Jan. 1991	TCI	Pittsburgh		Terrible signal interference from over the air WQED in prime viewership area. TCI refuses to do anything. Loss of viewers and underwriters.	

PUBLIC TELEVISION STATIONS
MUST CARRY DROP/SWITCH MASTER LIST

Call Letters	Location	Drop or Shift?	Date	Cable system name	Cable system Location	Replaced by:	Harm	Restored?
WQLN	Erie, PA	Shift from 9 to 13	4/3/89	Meadville Master Anter	Meadville			
WRJA	Sumter, SC	Shift from first tier to second tier.	12/1/86	TCI	Sumter		Viewer confusion. Shift occurred during fundraising drive	
WRLK	Columbia, SC	Shift from 11 to 15	12/1/86	TCI	Columbia		Weaker signal - change occured in the midst of fundraising drive	Yes
WSBE	Providence, RI	Shift from 9 to 36	10/1/87	Dimension	Warwick			
WSIU	Carbondale, IL	Shift		TCI	Harrisburg			
WSJK	Knoxville, TN	Drop	3/1/87	Daniels & Associates	Asheville	Discovery		
WSWP	Beckley, WV	Drop	Late 1980s	Triax	Paris, VA			Yes
WSWP	Beckley, WV	Drop	1/1/87	Blacksburg Cable TV	Blacksburg, VA		Loss of approx. 115 members and $5,700 in revenues.	No
WSWP	Beckley, WV	Drop	12/1/86	Harmon	St. Albans	CNN	Loss in viewership, and approx. 136 members and $6,800 in contributions	No
WSWP	Beckley, WV	Drop	Jan. 1987	Cablevision	Logan		Lost approx. 46 members and $2,300 in donations. Spent approx. $1,000 trying to get back on system.	Yes
WSWP	Beckley, WV	Shift	Prior to 6/88	Cablevision	Charleston		Lost approx. 310 members and $15,500 in income. Spent $10,000 trying to reverse shift	
WSWP	Beckley, WV	Shift from 11 to 7	5/9/88	Beckley Telecable	Beckley			
WTCI	Chattanooga, TN	Drop	Sept. 1986	Daniels & Associates	Rossville	Local Orgination		No
WTCI	Chattanooga, TN	Drop	April 1988	Lookout Cable	Ft. Oglethorpe, GA			No
WTIU	Bloomington, Indiana	Drop	June 1986	TCI	Franklin	American Movie Classics	Lost approx. 15 members and $700 in contributions.	Yes
WTIU	Bloomington, IN	Drop	1/7/87	TCI	Greensburg	Lifetime	Distance learning damaged.	Yes
WTIU	Bloomington, IN	Shift		Post Newsweek	Greenwood			
WTIU	Bloomington, IN	Shift		Omega Communication	Mitchell			Yes. 1/8/87
WTIU	Bloomington, IN	Shift		Omega Communication	Brazil			
WTIU	Bloomington, IN	Shift to 25		TCI	Bloomfield			
WTIU	Bloomington, IN	Shift		Cardinal	No. Vernon			Yes
WTVP	Peoria, IL	Shift from 12 to 29	Sept. 1990	NW Illinois TV Cable	Galesburg, Knoxville		Second largest cable subscribers in viewing area. No notice. Subscribers unaware;schools not notified. Carl Sandburg College without service.	Yes
WTVP	Peoria, IL	Shift from 6 to 19	Oct. 1987	TCI/Liberty	Cuba			Yes
WTVP	Peoria, IL	Shift from 7 to 21	10/1/87	TCI/Liberty	Canton			
WTVP	Peoria, IL	Shift from 6 to 19		TCI/Liberty	Lewiston			
WTVP	Peoria, IL	Shift from 4 to 11	Spring 1987	Continental CBV	Pekin			
WTVP	Peoria, IL	Shift from 4 to 11	Spring 1987	Continental CBV	Morton			
WTVP	Peoria, IL	Shift from 7 to 21	5/1/87	Fulton CATV	Canton			
WTVP	Peoria, IL	Shift from 6 to 19	Dec. 1986	Fulton CATV	Lewistown/ Cuba			
WTVS	Detroit, MI	Shift from 6 to 56	Sept. 1993	Continental	Dearborn Heights	TBS		Yes after station action

PUBLIC TELEVISION STATIONS
MUST CARRY DROP/SWITCH MASTER LIST

Call Letters	Location	Drop or Shift?	Date	Cable system name	Cable system Location	Replaced by:	Harm	Restored?
WTVS	Detroit, MI	Shift from 6 to 56	Aug. 1986	United	Lincoln Park	CNN	Only homes with converter boxes could receive station. After viewer and station complaints shifted to 26.	Yes, initially put on ch. 26 and pursuant to must carry put back on ch. 6
WTVS	Detroit, MI	Shift from 6 to 56 and then to 26	Jan. 1987	United	Oakland County	CNN	13 suburbs including 90,000 homes affected	Yes, pursuant to must carry
WTVS	Detroit, MI	Shift from 3 to 23	6/1/88	Comcast	Sterling Heights			
WTVS	Detroit, MI	Shift from 6 to 20	6/1/88	Booth	Birmingham			
WUCM	University Ctr., MI	Drop	Jan. 1989	Comcast	Flint	University of Michigan PTV Station	Loss in viewership; membership	Yes, October 1992
WUCM	University Ctr., MI	Shift from 19 to 28	2/1/87	TCI/Taft	Thomas Twp			
WUCM	University Ctr., MI	Shift from 10 to 19	4/1/88	Cablevision	Bridgeport/ Frankenmuth			
WUCM	University Ctr., MI	Shift from 25 to 28	2/1/87	TCI/Taft	Sebewaing			
WUCM	University Ctr., MI	Shift from 9 to 19	7/1/87	Huron Cable	Harbor Beach	CNN		
WUCM	University Ctr., MI	Shift		Gerity	Bay City			
WUCM	University Ctr., MI	Shift		Bresnan Comm.	Midland			Yes, on ch. 9 as of 1995.
WUCM	University Ctr., MI	Shift		Bresnan Comm.	Essexville			Yes, on ch. 9 as of 1995.
WUCM	University Ctr., MI	Shift from 3 to 19	5/1/87	Bresnan Comm.	Bay City	USA Network		Yes, on ch. 9 as of 1995.
WUCM/WUCX	University Center, MI	Shift from 11 to 32	July 1990	Cable Tec of Michigan	Sanford	QVC	Viewer confusion	
WUFT	Gainesville, FL	Drop	Jan. 1991	Cablevision of Central Florida	Citrus County	Fox	Significant station resources devoted to restoration. Without restoration, loss of member contributions could be $25,000.	Yes, after two weeks.
WUNC	Chapel Hill, NC	Drop	5/1/86	Cablevision Industries	Danville			
WUNG	Concord, NC	Shift from 4 to 5	Feb. 1987	Vision	Salisbury			
WUNG	Concord, NC	Shift from 9 to 30	5/1/88	CBV of Gastonia	Gastonia			
WUNG	Concord, NC	Shift from 11 to 28	5/1/88	CBV Belmont	Belmont	Billboard		
WUNG	Concord, NC	Shift from 4 to 20	Feb. 1987	Summit	Statesville			
WUNJ	Wilmington, NC	Shift from 8 to 13	2/16/87	Vision	Wilmington			
WUSF	Tampa, FL	Drop	7/1/86	Centel	Brooksville		At least 30 viewers called to complain.	
WUSF	Tampa, FL	Drop	Apr. 1986	Storer	Cape Haze, Englewood, Northport			
WUSI	Olney, IL	Drop	June 1986	TCI	Charleston	American Movie Classics		

PUBLIC TELEVISION STATIONS
MUST CARRY DROP/SWITCH MASTER LIST

Call Letters	Location	Drop or Shift?	Date	Cable system name	Cable system Location	Replaced by:	Harm	Restored?
WUSI	Olney, IL	Shift		Midwest	Mt Carmel			
WUSI	Olney, IL	Shift		TCI	Sullivan			
WVPT	Harrisonburg, VA	Shift		Cablevision	Lynchburg			
WVTA	Windsor, VT	Drop	Oct. 1988	State Cable TV	Center Conway NH	NHPTV		
WVUT	Vincennes, IN	Drop	June 1991	TCI	Jasper, Princeton	Encore, Court TV, Prime Sports Network	Loss of educational programming	
WWPB	Hagerstown, MD	Shift from 11 to 20	Prior to 6/88	TCI	Cumberland			
WXEL	West Palm Beach, FL	Drop	12/1/86	Selkirk	Ft Lauderdale	Discovery	Lost viewers and membership revenues	
WXEL	West Palm Beach, FL	Drop		Denntronics	Delray Beach		Lost viewers and membership revenues	
WXEL	West Palm Beach, FL	Shift from 11 to 42	8/28/89	Leadership Cablevision	Delray Beach			
WYCC	Chicago, IL	Drop		TCI	McHenry			Yes, pursuant to must carry
WYCC	Chicago, IL	Drop		TCI	Great Lakes			Yes, pursuant to must carry
WYCC	Chicago, IL	Drop	June 1986	United	Carpentersville	Discovery	WYCC is wholly instructional, targeted in large part to the Hispanic population, 70 college and adult telecourses lost	Yes, pursuant to must carry
WYCC	Chicago, IL	Drop	Dec. 1986	Centel	Elgin	Mex Channel	WYCC is wholly instructional, targeted in large part to the Hispanic population, 70 college and adult telecourses lost	Yes, pursuant to must carry
WYCC	Chicago, IL	Drop	Dec. 1986	Centel	Aurora		WYCC is wholly instructional, targeted in large part to the Hispanic population, 70 college and adult telecourses lost	Yes, pursuant to must carry

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

MEMORANDUM OF NATIONAL CABLE TELEVISION ASSOCIATION, INC. IN SUPPORT OF PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

* * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

AFFIDAVIT OF DAVID J. LARGE

I, David J, Large, declare on the basis of my personal knowledge and my expertise in the area of telecommunications and the cable television industry, the following:

1. I hold a Bachelor of Science degree (BSEE) from the California Institute of Technology, Pasadena, California. I am a senior member of the Institute of Electrical and Electronic Engineers (IEEE); a senior member of the Society of Cable Television Engineers (SCTE); and a member of the Engineering Committee for the National Cable Television Association (NCTA).

2. I hold three patents for microwave equipment and test equipment used by the cable industry. I have ten years experience (from 1978 to 1988) as the technical manager of Gill Industries, a large dual-cable, cable television system in San Jose, California. I have five years experience (from 1990 to 1994) as the Director of Engineering for InterMedia Partners, a multiple-system cable operator serving almost 600 franchises in 14 states. I left InterMedia Partners in 1994 to form Media Connections Group.

3. In 1986, I conducted a series of tests on antenna-selector switches (often called "A/B switches") that are used to alternate between cable and off-air reception of broadcast television signals. I determined that, in order to minimize the risk of signal leakage, A/B switches needed a higher degree of isolation between components than was then required by the rules of the Federal Communications Commission (FCC). My research led me to file comments before the FCC on behalf of Gill Industries in a rulemaking proceeding studying the question of the appropriate technical standards for such switches. My recommendations were ultimately adopted by the Commission in substantial form.

4. I have had substantial field experience with the installation, use and maintenance of A/B switches. Because the San Jose cable system that I managed is a dual-cable system, subscribers regularly used such switches to select between the "A" and "B" cables that delivered programming to their homes.

5. In preparing this affidavit, I have relied on research that I myself conducted; on research conducted by my partner, David G. Rozzelle, under my direction; and on publicly-available research and data generally relied on by members of the cable television industry.

6. I have approximately 22 years of experience in the cable industry, including service on the NCTA engineering committee and the EIA-NCTA joint engineeering committee. Although my area of expertise comprises cable television technical matters generally, I have specialized in consumer electronics issues (*e.g.*, performance standards for cable-ready receivers, splitters, transformers, jumper cables, A/B switches, and other cable interface equipment) and the performance of distribution systems. My curriculum vitae is attached at Appendix I.

THE BASIC USES OF AN A/B SWITCH BY CABLE SUBSCRIBERS

7. According to a February 1995 estimate in *Marketing New Media*, a newsletter published by Paul Kagan & Associates, a recognized information source in the television industry, about 38% of television households do not subscribe to cable service. In order to watch local broadcast television stations, these non-cable households

generally connect their television receivers to antennas, as shown in Figure 1. As explained in greater detail in

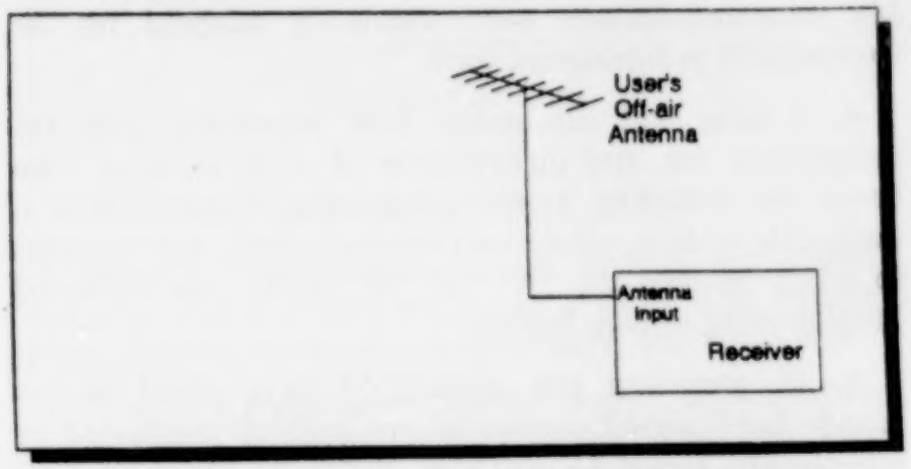

Figure 1: Receiver Connected to Television Antenna

Joseph Stern's affidavit, when viewers live fairly close to desired stations, the antenna may be a simple indoor antenna—*i.e.*, a wire loop for UHF reception, or a set of "rabbit ears" for VHF reception (two adjustable-length small rods protruding from a plastic base and designed to sit on top of the TV set). If programming from distant stations is desired, outdoor antennas are usually required for good reception.

8. Subscribers to cable television service, on the other hand, generally receive off-air, as well as cable-exclusive channels (such as CNN, HBO and ESPN), through the cable company's facilities. In that case, the subscriber's receiver is usually connected to the output of a converter (descrambling device) furnished by the cable company, but may sometimes be directly connected to the cable company service wire. The converter, if used, tunes all cable channels and may also provide additional features not available with direct connection (such as a remote control when not otherwise available). Converters are also used to compensate for deficiencies in some receivers (such as a tuner that is poorly designed or has insufficient tuning range). The normal connection of a receiver to cable service is shown in Figure 2.

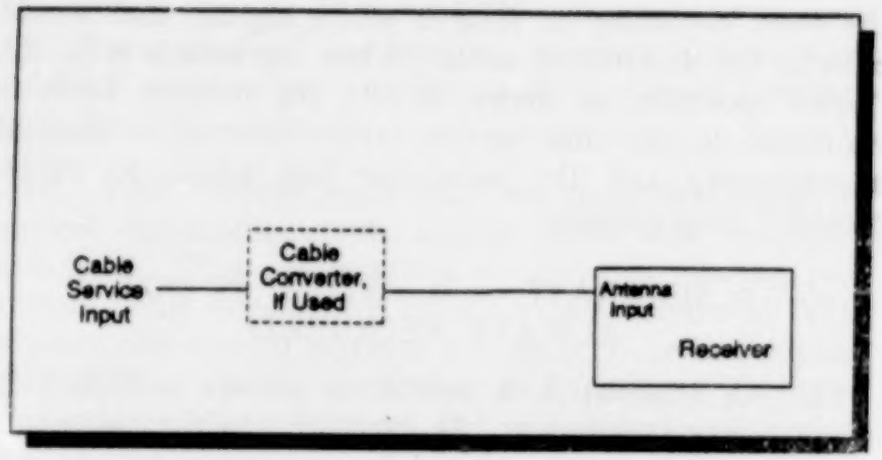

Figure 2: Receiver Connected to Cable Television Service

9. When a cable system does not carry all locally-receivable broadcast stations, cable subscribers can alternate between reception of cable programming and recepiton of those not-carried stations. In some cases, switching back and forth between cable and off-air signals requires a device called an antenna-selector switch (better known as an "A/B switch"). In other cases, as I will explain below, cable subscribers will not require *any* additional equipment to select between cable and over-the-air television.

10. Based on my experience in the cable industry and research that I have conducted, I believe that A/B switches, when required, are a low-cost, simple-to-install, and simple-to-use method by which cable subscribers can obtain access to not-carried broadcast stations. When off-air reception capability is desired, properly installed A/B switches provide the user the same off-air reception capability that he or she would have if not a cable subscriber.

HOW THE A/B SWITCH WORKS

11. The usual installation of a stand-alone A/B switch is shown in Figure 3. When the switch is in the "up" position, as shown at [A], the TV set's antenna input is connected to the off-air antenna and the user has exactly

the same capability to receive off-air signals that would exist in the absence of cable. When the switch is in the "down" position, as shown at [B], the receiver input is connected to the cable service (either directly or through a converter) and the subscriber has access to cable-provided programming.

A SEPARATE A/B SWITCH IS NOT ALWAYS REQUIRED

12. An external A/B switch, as shown in Figure 3, is not always necessary. As explained below, there are

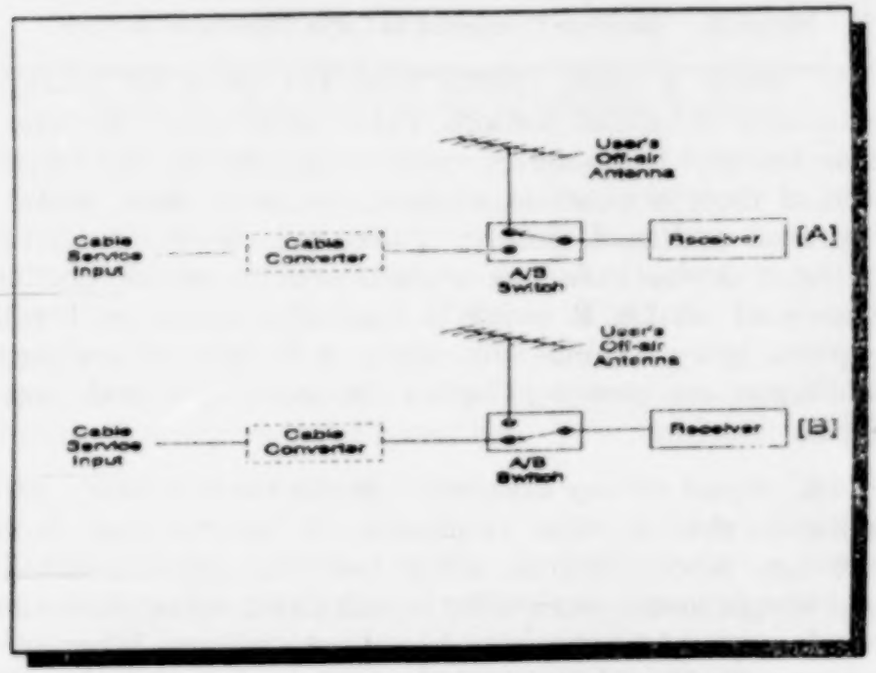

Figure 3: A/B Switch Installation and Operation

two circumstances in which a cable subscriber can alternate between cable and off-air reception without installing a stand-alone A/B switch.

UHF-Only Access

13. Broadcast television channels are divided into two groups on the basis of their frequency range: VHF

(channels 2 through 13) and UHF (channels 14 through 69). Some receivers use separate circuitry to tune VHF and UHF stations and provide separate antenna terminals for each tuner circuit.

14. VHF stations statistically are those that enjoy the greatest viewership, both among cable and non-cable households. Thus, in response to customer viewing preferences, cable systems are likely to carry almost all VHF stations; non-carried stations are likely to be less-popular UHF stations. In my experience as Director of Engineering for Inter Media Partners, the vast majority of stations that elected must-carry status to ensure cable carriage were UHF stations.

15. When the owner of a receiver with separate VHF and UHF input terminals wishes to access exclusively UHF stations, he need only connect his off-air antenna to the otherwise-unused UHF antenna input, as shown in Figure 4. With this connection, whenever the viewer

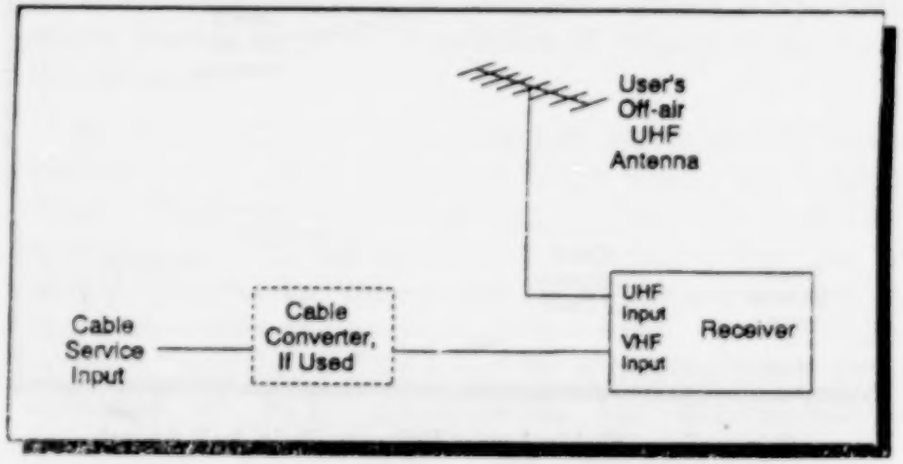

Figure 4: Switch-less Access to UHF Broadcast Stations

selects a UHF channel, he will automatically receive signals from his UHF off-air antenna. When the viewer selects a VHF or cable channel, he will receive signals from the cable service (either directly or through a con-

verter). An A/B switch is unnecessary in these circumstances.

Receivers with Built-In A/B Switches

16. Most high-end, cable-ready receivers have A/B switches built in as a feature. (By "cable-ready," I mean a receiver that has a broad enough tuning range to tune all cable channels and that permits direct connection to the cable wire without a converter.) A built-in A/B switch functions the same way as an external switch, although it operates electronically, rather than mechanically.

17. When the viewer's receiver has a built-in A/B switch, no additional hardware is required to receive off-air signals. The only installation necessary is connection of the off-air antenna to the TV set's alternate input terminal, as shown in Figure 5. With this connection, the

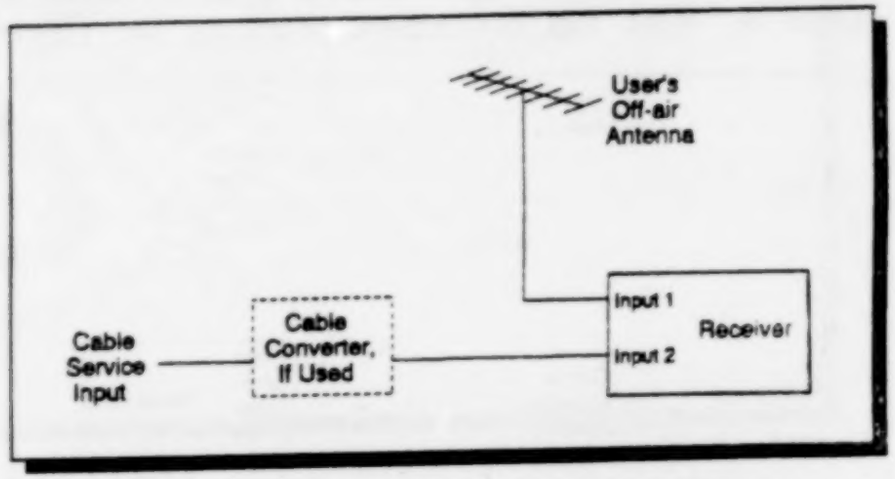

Figure 5: Off-Air Access Using Built-In A/B Switch

viewer switches between the two inputs to alternate between cable and off-air reception. The off-air reception can be VHF, UHF or both as desired by the viewer. Switching is usually done via remote control.

COST AND AVAILABILITY OF A/B SWITCHES

18. In the cases above, there is no cost to the consumer (besides the cost of an antenna) for alternating between off-air and cable reception. In cases where an external A/B switch is needed, it can be purchased at low cost and conveniently installed by the cable subscriber.

19. In the course of preparing this affidavit, I conducted an informal survey concerning the price and availability of A/B switches. I found that A/B switches are in stock at many stores that sell hardware products, electronics equipment, and television receivers, such as Radio Shack, ACE Hardware, Good Guys, Circuit City, and Fry's Electronics. With the exception of Fry's which is a large regional electronics chain, the retailers listed are all national chains of stores. Additionally, some of the stores that did not carry A/B switches (such as Sears) carried other television accessories by the same manufacturers that make A/B switches. Presumably, these stores would carry A/B switches if requested to do so by customers.

20. I found that A/B switches are marketed under various brand names, including Radio Shack, RCA, Black Point Products and Recoton. Currently available switches vary in appearance and features, but are all clearly marked as "high-isolation" switches intended for use with cable television service. Most of the "high-isolation" switches I found had the following label, which conforms to FCC requirements for antenna-selector switches:

This device is verified to comply
with FCC rule Part 15 for use
with cable television service

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21. When a stand-alone A/B switch is used, a short "jumper" cable is generally required between the switch and the antenna input connector on the user's receiver. Every store selling A/B switches also sold the matching jumper cables.

22. The prices of the A/B switches I surveyed varied, but all models were available in at least one store for under $10.00. Typical is Radio Shack, which offered two switches (one with gold plating) for $6.99 and $7.99, and jumper cables for $2.69.

23. Based on my experience in the cable television industry and on the results of this study, I conclude that good-quality A/B switches are readily available at reasonable prices.

EASE OF INSTALLATION

24. While investigating the availability of A/B switches, I found that, in every case, the switch packaging included instructions for installation of the switch as a means of alternating between cable and off-air reception. Generally, there were diagrams showing how to attach the A/B switch to the antenna, the cable and the receiver. In my opinion, these diagrams are easy to understand by a lay person.

25. A typical installation—involving a single, coaxial antenna lead-in wire and a single, coaxial antenna input terminal on the receiver—takes a few minutes and consists of the following steps:

- Mount the switch in a convenient location. The Radio Shack switches come with screws and a self-stick adhesive pad to allow for a variety of mounting options and locations.
- Connect the cable wire to one side of the A/B switch (Connector "A" in Figure 6).

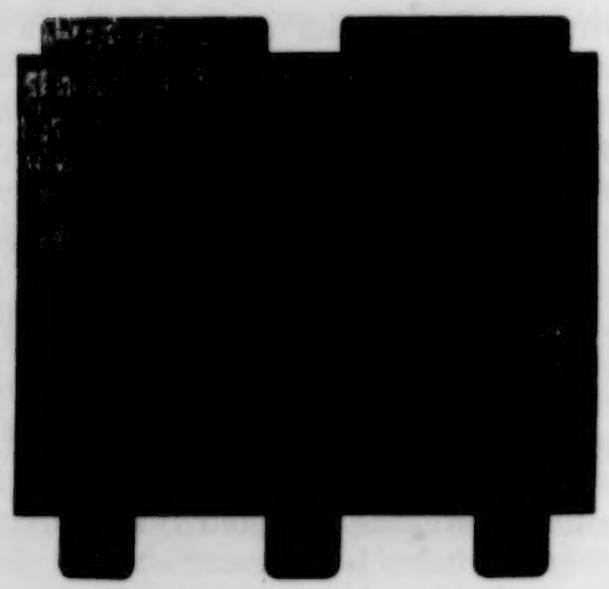


Figure 6: Typical A/B Switch

- Connect a jumper wire from the switch output terminal to the receiver's antenna input terminal (the middle connector in Figure 6).
- Connect the off-air antenna wire to the other side of the switch (Connector "B" in Figure 6).
- Select cable or off-air programming by pushing one of the buttons on top of the switch (as shown in Figure 6).

26. There are many small variations on the above installation, necessitated by differing types of antenna terminals on the receiver, differing types of off-air antenna lead-in wire, whether there are separate VHF and UHF terminals, etc. It has been my experience, however, that cable company technicians and personnel employed by consumer electronics stores offer ready assistance with switch installation. InterMedia Partners, for instance, published an internal guide for its technical personnel so that they could most effectively help subscribers install A/B switches. The guide described 19 possible installation scenarios, including the many small variations men-

tioned above. However, four relatively simple scenarios covered most installations and, in any case, cable personnel were instructed to determine each customer's particular needs and provide non-ambiguous instructions for installation of the A/B switch.

27. A relatively small percentage of cable customers have more elaborate television configurations, including multiple VCRs, videodisc players, videogames, etc. Generally, these subscribers have already installed switches and a variety of complex circuitry to allow for flexibility in viewing and recording. To address this market, vendors offer more elaborate switching devices, including multiple-position switches, integrated switch/splitter arrangements and switches with remote controls, so that the entire configuration can be operated from a remote control pad. As a simple example, Radio Shack offers a high-isolation three-position A/B switch that allows switching between cable, off-air and a third source such as a video-disk player. The addition of a direct off-air antenna feed to a home-theater configuration of this sort entails a minor increase in complexity.

28. In 1987, the FCC considered consumers' ability to manage proper installation of A/B switches and concluded as follows:

> Evidence that subscribers can make complex cable connections correctly is provided by the fact that there have been no widespread problems or difficulties encountered by consumers in installation of cable-ready VCRs and receivers. We also observe that * * * many cable subscribers are now acquiring and successfully installing their own cable terminal/converter equipment. * * * We are aware of no widespread or general problem with consumers' installation of this equipment and believe that consumers also can correctly install input selector switches. In any event, those who contend consumers cannot properly install switches present no credible evidence to support their claim.

Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems, 2 FCC Rcd. 3593, ¶ 51 (March 26, 1987) (hereafter cited as "1987 FCC Report"). I agree with the Commission's judgment. I am aware of no significant complaints from consumers that A/B switch installations are unduly complex, and cable operators in any event are always ready to install switches for their customers.

29. Based on my experience, I conclude that installation of A/B switches for those subscribers who need them is generally straightforward and relatively easy, in light of assistance available from packaging instructions and cable company personnel.

EASE OF USE

30. Switching between cable and off-air reception is very simple. In most cases, it requires pushing a single button on an A/B switch or remote control pad. In some cases, the viewer may also need to push a second button, called a "tuning mode" or "cable/normal" switch. Use of this second switch is necessary when a viewer wishes to receive off-air UHF stations and does not use a set-top converter in conjunction with his cable service. In the following paragraphs, I will discuss the function of a "tuning mode" switch, the function and prevalence of converters, and use of a "tuning mode" switch when no converter is present.

Tuning Modes

31. Due to the way television channel numbers were developed over the years, the same channel number may refer to two different frequencies. In general, VHF channels (2-13) refer to the same nominal frequencies whether off-air or off-cable. Above 13, however, the same

channel number may be used to refer to either cable-exclusive channels or UHF broadcast channels, which are far apart in the frequency spectrum.

32. This numbering problem, while largely confined to the UHF range, occasionally arises in the VHF range also. A small (and decreasing number) of cable operators use tuning schemes (known as HFC or IRC) in which some or all VHF channels are offset from their nominal broadcast frequencies. Many modern receivers automatically adjust to accommodate this difference in frequencies, however, and no action by the television viewer is necessary in that event.

33. To accommodate this numbering problem, all manufacturers of receivers that are capable of being directly connected to a cable wire and tuning cable-exclusive channels provide two user-controlled "tuning modes." By varying the tuning mode, the viewer in effect tells the receiver whether to tune the cable or the UHF frequency corresponding to a particular channel number. The tuning mode function is built into all cable-ready receivers, so no additional equipment or installation by the consumer is required.

Tuning When a Converter is Used

34. Although all cable-ready receivers are equipped with a tuning mode control, it need be activated only when the receiver is *directly* connected to the cable wire, *i.e.*, when no converter is used. Although some cable subscribers can make a direct connection between their TV sets and the cable wire, this connection is more commonly made through a set-top converter. Cable companies furnish (or customers independently acquire) converters for a variety of reasons:

- The customer's receiver may not have sufficient tuning range to access all available cable channels;

- The customer's receiver may not have sufficient performance quality to allow direct connection to cable services;
- The customer may wish to access optional programming that the cable operator has scrambled in order to control access (HBO, for example); or
- Use of a converter may offer features not otherwise available to the subscriber, such as remote tuning control, remote volume control, on-screen tuning guides, access to movies on demand, etc.

35. Converters may be used simply as tuners, or may be used to descramble optional services as well. However, all converters have the common property that they tune the cable channels and convert all tuned channels to a common output channel (generally channel 3 or 4) for interface with the customer's receiver.

36. Precise data on the number of converters currently in use is not readily available. However, as I explain more fully in an addendum (¶¶ 77-81, *infra*), I believe that approximately 70% of cable households now have at least one receiver connected through a converter, and that the percentage of cable subscribers using converters will increase substantially during the next few years.

37. When a converter is used to tune cable channels, the tuning mode rarely, if ever, needs to be changed. The reason is that the output signal from the converter to the television receiver is always on a standard VHF broadcast channel (usually channel 3 or channel 4). Thus, the receiver can be left permanently in the "off-air" tuning mode.

38. The only exception to this general rule occurs where a subscriber leases a "by-pass" converter, which allows cable-ready receivers to access cable channels directly unless the converter is used to descramble premium services (like HBO). As of October 1994, cable opera-

tors were required to offer subscribers the option of leasing "by-pass" converters. Based on my experience, I expect few subscribers will request this type of converter, but those that do will need to switch tuning modes when alternating between cable and off-air programming.

39. Changing the tuning mode is also unnecessary when the viewer subscribes to a "basic-only" cable service, which uses only channels 2-13. A "basic-only" subscriber needs to push only the A/B switch in order to alternate between cable signals and off-air UHF programming.

40. For these reasons, I conclude that the substantial majority of cable households can now switch between cable and off-air programming by pushing one button on an A/B switch, with no need to activate a tuning mode switch. As the number of cable households with converters increases, the number of consumers who need to operate a tuning mode switch will decrease proportionally.

Tuning Receivers In The Absence Of A Converter

41. Operation of a tuning mode switch, when necessary, is usually quite simple. Most modern cable-ready receivers make the change electronically in response to user commands via their remote control. To verify that, I supervised an examination of receivers currently being sold in retail stores. This examination covered 126 randomly selected television set models and 36 randomly selected VCR models manufactured by 13 different companies; all but one of these 162 receivers were cable-ready. Of the 161 cable-ready receivers examined, 82% allowed manipulation of the tuning mode function by remote control. The remaining 18% provided front panel controls for this purpose.

42. Many older receivers—typically, those manufactured before 1986—used a physical switch to control the tuning mode function. This switch was often located inconveniently at the back of the TV set. While some of

these older receivers are probably still in service, they typically have limited tuning range and thus require a converter to access all the cable channels. As explained earlier, the tuning mode does not need to be changed when a converter is used.

43. In cases where it is necessary to change the tuning mode and a subscriber finds that inconvenient, he or she always has the option of acquiring a converter to tune cable channels. The cost of converters used as tuners starts at approximately $50 (depending on features). Converters can be purchased outright from retail electronic stores, or leased from cable operators at federally-regulated rates.

44. Based on sales data furnished by the Electronics Industry Association (EIA), the average household buys a new TV set every 6.4 years. Since all, or virtually all, new cable-ready TV sets and VCRs have easily accessible tuning mode switches, any residual problem with accessibility of tuning mode controls will continue to decrease rapidly.

45. For these reasons, I do not believe that the "tuning mode" switch currently poses a significant impediment to cable subscribers' ability to switch from cable programming to off-air programming. In most currently marketed "cable-ready" receivers, the tuning mode feature can be operated by remote control. Cable subscribers with older sets (on which the tuning mode switch may be less accessible) frequently access cable channels exclusively through a converter, in which case the "tuning mode" switch never needs to be operated at all. Finally, even where a cable subscriber is not *required* to have a converter to tune cable channels, the subscriber always has the option of purchasing or leasing one from the cable system at moderate cost if he or she wishes to avoid changing tuning modes.

Advanced Functionality

46. As discussed above, some cable subscribers may wish more flexibility than offered by a simple A/B switch. They may, for instance, wish to be able to tape a cable program while simultaneously viewing an off-air program. While these needs are often met by the control features of a "home theater" suite of equipment, they can also be accommodated by use of multiple switches and signal splitters. Integrated switch assemblies are readily available for this purpose. For instance, Qintar, Inc. offers a "VCR Interface Switch" that accommodates signal inputs from cable, antenna and a third source (such as a VCR or video-disc player) and allows full flexibility among viewing, taping and play-back of previously taped video material. This unit is listed in Qintar's catalog for less than $25.00.

47. By way of summary, the table below describes the adjustments necessary to alternate between cable and off-air reception, depending on the configuration of the cable subscriber's equipment:

Equipment Configuration	Changes to Alternate Between Cable and Off-Air Reception of			
	VHF		UHF	
	A/B Switch	Tuning Mode	A/B Switch	Tuning Mode
A/B Switch used with a Converter	Yes	No	Yes	No
A/B Switch used w/o a Converter	Yes	No	Yes	Yes
Separate VHF/UHF Antenna Inputs (No A/B Switch)	n/a	n/a	No	Yes

Thus, only in the case of a subscriber who does not use a converter and wishes to access UHF off-air channels are changes required to both the A/B switch and the tuning mode. In all other cases, either the A/B switch or the tuning mode, but not both, needs to be changed.

TECHNICAL QUALITY ISSUES

History of FCC Regulation of A/B Switches

48. In an August 1986 Report and Order, the FCC required that cable operators carry local broadcast television stations for a transition period of five years. *Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems*, 1 FCC Rcd. 864 (hereafter cited as "1986 FCC Report"). The Commission also mandated:

- that cable operators offer new customers free installation of A/B switches on every cable-connected television receiver;
- that cable operators annually (for a period of five years) offer to supply A/B switches at no cost to existing customers, who would have the choice of self-installation or paid installation by the cable operator;
- that cable operators provide consumer-education material to inform their subscribers about the need for A/B switches, and refrain from suggesting that customers dismantle their existing off-air antennas.

The Commission further proposed to subject A/B switches to then-existing technical performance standards, as set forth in FCC rules.

49. In response to petitions for reconsideration filed by several interested parties, the Commission modified these rules in a March 1987 supplemental opinion (1987 FCC Report, *supra*). While confirming its commitment to the basic policy of encouraging widespread installation

of A/B switches, the Commission revised its rules in several respects, including:

- Cable systems would be allowed to charge customers for the material cost of switches in all instances, though not for labor when done as part of a new-customer installation;
- The Commission agreed to open a separate rulemaking to consider upgrading the technical performance standards for A/B switches used specifically to alternate between cable and antenna reception of broadcast television signals.

50. In April 1987, the FCC issued a Notice of Proposed Rulemaking concerning A/B switch technical standards. In a November 1987 Report and Order, the Commission created a new category of A/B switches—"antenna selector switches"—and increased the isolation standards for these switches by 20 dB, *i.e.*, by a factor of 100. Under the new standards, antenna selector switches were required to have a minimum isolation of 80 dB at lower frequency ranges (from 54 MHz through 216 MHz) and a minimum isolation of 60 dB at higher frequency ranges (217 MHz through 550 MHz). *See* 47 CFR §§ 15.115 & 15.117. The upper frequency limit was chosen because it was typically the upper frequency limit of cable operation at that time. The new standards applied both to stand-alone switches and to switches built into television receivers and, as explained below, effectively eliminated the concern that antenna selector switches might "leak" signals from one source to the other. The Commission also instructed cable operators to inform subscribers who choose to install switches themselves about the proper routing of leads to maintain proper isolation between cable and off-air signals.

51. Following the D.C. Circuit's decision in *Century Communications Corp. v. FCC*, 835 F.2d 292 (1987), *clarified*, 837 F.2d 517, *cert. denied*, 486 U.S. 1032

(1988), the FCC suspended its must-carry rules, but retained its rules governing antenna selector switches.

52. Section 17 of the 1992 Cable Act directed the Commission (among other things) to set standards for television receivers marketed as "cable-ready" or "cable-compatible." As part of the rulemaking initiated in response to this congressional mandate, the FCC extended its A/B switch standards to require a minimum isolation of 55 dB at very high frequencies (between 550 MHz and 806 MHz). This extension was necessary to reflect the increasing channel capacity of cable systems and cable-ready receivers, and the higher frequencies at which cable systems now operate.

Signal Leakage Issues

53. When widespread, mandatory installation of A/B switches was first proposed by the FCC in 1986, various parties, including myself and other members of the cable industry, raised certain technical objections. The principal objections were as follows:

- The isolation standard set forth in then-existing FCC rules was insufficient to ensure protection against:
  - radiation of cable signals in excess of acceptable signal leakage limits; and
  - degraded pictures caused by mutual interference where the same channel was available off-air and on cable, and no converter was used.
- Improper installation of an A/B switch could lead to inadvertent signal leakage, even if the switch itself was of adequate quality.
- In those cases where the subscriber's antenna lead-in wires were unshielded and, coincidentally, the internal construction of the receiver used a similar type of wire, improper placement of wiring behind the receiver could lead to unacceptable signal leakage and picture degradation.

- A/B switches then on the market allegedly were not durable and, as the switch "wore out," its effective isolation would decrease. This could lead to signal leakage and picture degradation over time.

54. These objections had varying degrees of technical merit at the time they were originally advanced. However, I do not believe that any of them is a material concern today. Most of these problems have been solved by subsequent FCC action mandating higher performance standards for A/B switches, or by manufacturers' improvements in switch and TV receiver design. Some objections, such as the supposed risk of improper installation, have turned out to be non-problems in the real world. I thus conclude, for the reasons stated more fully below, that antenna selector switches now on the market are reliable and perform their intended function properly.

Required Switch Signal Isolation

55. Based on evidence presented by several cable industry engineers, including me in particular, the Commission issued much more stringent performance requirements for A/B switches in November 1987. The prior standards were designed for switches used primarily to connect video games to television receivers, which require lower isolation than those used to alternate between cable and off-air reception. The new standards for antenna selector switches increased the required isolation by a factor of 100 (*i.e.*, by 20 dB). This level of isolation is sufficient to protect both against excessive radiation of cable signals and against mutual picture interference between cable and off-air signals sharing common channels. The FCC considered its A/B switch rules again in April 1994. While finding no need to alter the November 1987 standards at lower frequency ranges, the Commission extended those standards to encompass the highest frequency ranges now used in cable systems.

56. In my opinion, the present technical standards for isolation of antenna selector switches are acceptable. Any

switch manufactured in conformance with the FCC's November 1987 standards is very unlikely to cause unacceptable radiation or picture quality degradation. To the extent that older or non-conforming switches are still in service, their replacement with a new model, at a cost of approximately $7.00, will generally solve any problems.

Improper Installation

57. Some parties originally expressed a concern that subscribers might connect the wrong combination of cables and terminals to an A/B switch. This could result in a direct connection of the cable wire to the subscriber's antenna in one switch position, causing cable signals to radiate up the antenna and interfere with broadcast frequencies. While this mistake would have been immediately obvious to the viewer—the switch would not perform the expected function, and no picture would appear on the TV screen—it was feared that signal leaks might occur in the interim.

58. The FCC considered this possibility in its 1987 Report. It noted that, when converters are used, the interference potential in practical terms is small, because a converter has only one output channel that can potentially radiate, even if the switch is improperly installed. In any event, the FCC found the risk of improper installation to be minimal, citing customers' lack of difficulty in hooking up such equipment as VCRs, converters and cable-ready television sets. The Commission stated (¶ 50):

> We believe that the technical problems described by those seeking elimination of the input selector switch requirements are much overstated. First, improper installation of switches by subscribers is not likely to be a cause of harmful signal leakage. Cable subscribers generally will be able to install these devices properly themselves if they are provided with appropriate instructions, including directions to immediately check for proper switch operation.

59. My experience in subsequent years has led me to believe that the Commission was correct in its judgment. I am aware of no significant or widespread problem of signal leakage caused by improperly installed A/B switches.

Receiver Design

60. In 1987, when the Commission first proposed universal switch installation, many television receivers used a type of cable between the antenna terminals and the internal tuning circuitry that exhibited very poor shielding. This type of cable, known as "twin-lead" cable, has the property that, if located near an antenna feedline of similar type, some portion of the signal on one cable can be "coupled" to the other cable. This could potentially result in undesirable interference.

61. Three factors have combined to make this risk negligible in 1995:

- Since 1987, it has become rare for receivers to use unshielded wiring. In fact, I am aware of no current production model that uses it. Receivers that have a sufficiently extended tuning range to tune cable channels directly are almost invariably equipped with coaxial cable between the antenna terminals and tuner. The use of coaxial cable eliminates any risk of interference.
- The few receivers that use unshielded wiring are older sets that generally cannot tune all the channels used by cable companies. For that reason, the set owner normally must use a converter, which delivers its entire output through a single channel. Furthermore, it is common practice for cable operators to chose converter output frequencies that do not correspond to local off-air broadcast stations. Thus, even if there were some coupling of the single channel to or from the user's antenna, the risk of mutual interference is negligible.

- With respect to the small number of subscribers who have unshielded receiver wiring, unshielded off-air antenna lead-in wire, and no converter, the risk of interference is still minimal in practical terms. Since 1987, the FCC has required cable operators to instruct subscribers choosing to install their own A/B swiches about proper routing of interconnecting cables to avoid signal leakage. In those rare instances where interference does occur, reception will suffer and customers are likely to call the cable company immediately to rectify the problem.

62. In sum, I conclude that the risk of signal leakage stemming from receivers' use of unshielded wire to connect antenna terminals is negligible at the present time.

Switch Durability

63. It is difficult to gather data on the durability of A/B switches installed for the purpose of selecting between cable and off-air programming. However, a parallel situation occurs in the case of cable operators who use dual-cable distribution systems. Dual-cable systems were built for a variety of reasons, including a desire by the cable operator to have twice the channel capacity that a single cable could provide.

64. In a dual-cable system, two identical sets of cables, amplifiers and other equipment are installed side-by-side on the same poles. Two wires are brought into each home, with half the carried channels being carried on each cable; thus, each channel number is used twice. The subscriber is furnished with an A/B switch for selecting between the programming on the two cables. If subscribers experience interference between the channels on the two cables, they typically call the cable operator, who dispatches a technician to replace the faulty component.

65. Since many cable operators keep computerized records of trouble calls, I contacted a large dual-system

operator to determine what the rate of failure was for A/B switches. The operator in question delivers cable service to approximately 168,000 subscribers via dual cables. Some of these subscribers have converter boxes that include electronic A/B switches, while other subscribers use external mechanical switches. Since electronic switches are highly reliable—they have no mechanical components to wear out—I attempted to determine the failure rate among the mechanical switches.

66. The recorded monthly switch failures for the past fifteen months varied from 41 to 74, with an average of 56.7 per month. Virtually all these failures are attributable to mechanical switches, which I estimate be in use by roughly half of the subscribing households. Thus, the average monthly rate of switch failure is 56.7/84,000= 0.00068.

67. Otherwise stated, the probability of a switch failing during one year is less than 1%. (If a device has a failure rate per unit time of λ, the probability of failure during any time period t is $1 - e^{-\lambda t}$. In this case, t = 12 months. Using the experiential failure rate data furnished, I calculated the probability of a switch failing in one year to be .00813, or 0.813%.) This low rate of switch failure, coupled with a replacement cost of approximately $7.00, leads me to the conclusion that the durability and reliability of mechanical A/B switches is acceptable.

68. The failure rate that I estimate for A/B switches now in service is substantially better than the 22% to 36% failure rate reported by the NCTA in November 1986. *See* "The A/B Switch Requirement: A Report by the NCTA Engineering Committee," at 13. I believe that this differential is largely attributable to improvements in equipment design during the past nine years. When A/B switches first became popular, in the 1970s and early 1980s, there were many poorly manufactured switches on the market. Many of these switches had poor isolation to

begin with, having been manufactured before the FCC strengthened its switch performance standards in 1987. As technology improved and competition increased, manufacturers of the substandard switches either had to improve their product or be forced out of the business. I personally observed this phenomenon while at Gill Industries, which on one occasion purchased substandard A/B switches from a particular manufacturer. As soon as higher-quality switches became available, Gill Industries immediately began purchasing them and discontinued purchasing switches from the original supplier. Since 1987, manufacturers have been required to verify that their antenna selector switches meet current FCC standards, thus assuring that adequate performance characteristics are designed into such switches during their manufacture.

69. For the reasons explained above, I conclude that A/B switches currently on the market pose no significant risk of signal leakage, be it attributable to inadequate isolation, faulty installation, poor shielding, or switch failure. Moreover, in the unlikely event that signal leakage should occur, I believe it would be promptly detected and corrected. The FCC imposes strict regulations requiring cable operators to monitor all systems for signal leakage every calendar quarter. Such monitoring is accomplished by random testing, by a "dedicated drive-out," or by an airplane "fly-over." (In a "dedicated drive-out," a cable technician, equipped with an antenna and receiver, drives the entire route of the cable system and records all leakage. An airplane "fly-over" is conducted similarly, but from the air.) Based on my experience with Gill Industries and InterMedia, I can state confidently that cable operators take their signal-leakage-detection activities very seriously. If a significant signal-leakage problem existed today, I would be aware of it through the trade press, my membership on the NCTA engineering committee, and my frequent contacts with cable operators.

70. In summary, based on my experience and my knowledge of the cable industry, it is my opinion that antenna selector switches manufactured in accordance with current FCC standards do not pose a significant risk of signal leakage in excess of allowable limits.

EVIDENCE THAT A/B SWITCHES WORK IN PRACTICE

71. In 1993, local broadcast stations were given the choice of mandatory carriage on cable systems ("must-carry") or negotiating with cable systems for payment in exchange for carriage ("retransmission consent"). Most stations that did not elect must-carry successfully negotiated for carriage. However, in Corpus Christi, Texas, all three major networks initially failed to reach retransmission-consent agreements and were temporarily dropped from the cable system. To assist subscribers in obtaining off-air access to network programming, the Corpus Christi system distributed 40,000 A/B switches to subscribers in early October 1993. *See Cable World*, November 22, 1993, page 70.

72. It may be inferred that the switches so distributed were correctly installed by subscribers who needed them, and that the switches functioned properly. In general, the viewership ratings of the three major broadcast networks did not drop significantly in Corpus Christi, even though most households maintained their cable subscription. A November 29, 1993 report in Warren's *Cable Monitor* stated, at page 7:

> Being off cable more than 6 weeks didn't have [a] big impact on stations, especially after the first few weeks, said Frank Smith [of] NBC affiliate KRIS-TV. According to Arbitron and Nielsen ratings during news shows, [the] 3 network affiliates accounted for 57% of audience Oct. 13, 69% Nov. 3, 67% Nov. 10. Affiliates normally have about 70% of viewing

> when they're on cable, Smith said. He said cable subscribers were quite willing to switch to antennas to receive broadcast programming, particularly since [the] broadcast signal generally is good throughout relatively flat terrain: "I think we surprised a lot of young people," Smith said. "They didn't know there were other ways to watch TV than through the cable."

The Corpus Christi experience demonstrates that large numbers of switches can be installed properly in a short period of time without significantly damaging broadcast stations' viewership.

73. The fact that other industries depend heavily on antenna selector switches to provide access to local broadcast programming provides further evidence of the switches' practical utility. The direct broadcast satellite (DBS) industry sends programming directly to customers' earth-station antennas. Because DBS providers offer a single, nationwide programming line-up, it is impractical for them to carry local broadcast stations in each market. For that reason, many customers maintain their own off-air reception capability and switch between satellite and local off-air reception. Depending on the service provider, this switching may be provided as part of the satellite receiver or through a stand-alone A/B switch. Paul Kagan & Associates, publisher of several newsletters covering all aspects of the video industry, reports that there were 1.53 million DBS customers (all providers combined) in 1994, and projected that there would be 2.26 million DBS customers in 1995. *Marketing New Media*, Feb. 20, 1995, page 4.

74. Another industry that relies heavily on A/B switches is terrestrial point-to-multi-point microwave (MMDS). According to Kagan, MMDS providers served 430,000 subscribers in 1994 and are projected to serve 620,000 subscribers in 1995. Because MMDS service has

limited channel capacity—24 to 33 channels are typical—operators usually carry few, if any, local broadcast stations. As is true for DBS subscribers, it is common for MMDS subscribers to maintain their own local off-air reception capability and use A/B switches to select microwave or off-air reception as desired.

75. In sum, approximately two million of the nation's television households were served in 1994—and approximately three million of those households are expected to be served in 1995—by distribution services that carry few, if any, local broadcast television stations. Some form of A/B switch is required in each of these homes to obtain access to over-the-air broadcasts, including ABC, CBS, NBC, and Fox.

CONCLUSION

76. It is my opinion, based on my experience in the cable television industry, that antenna selector switches are an acceptable, low-cost method of providing access to cable television programming and off-air television broadcast programming in a cable household.

ADDENDUM: PREVALENCE OF CONVERTER USAGE IN CABLE HOUSEHOLDS

77. I attempted to obtain statistics from electronics industry sources regarding the prevalance of converters. Because much of this information is "proprietary" to equipment manufacturers and thus not publicly-available, I undertook to determine, based on data gathered by the Nielsen Company, what percentage of receivers is connected through converters. In September 1993, Nielsen estimated that 64% of metered households were cable subscribers; that 36% of metered households used a converter on the metered TV set; and that 28% of metered households, while not using a converter on the metered TV set, may have used one on other TV sets. *See* Nielsen, "A Review of Nielsen's Plans and Special

Procedures to Meet the Audience Measurement Challenges of Retransmission Consent," September 22, 1993.

78. From these Nielsen statistics, it may be inferred that 56% of cable homes used a converter on the principal TV set. (This percentage is the ratio of 36% to 64%.) Of the remaining 44% of cable homes, I estimate that approximately one-third, or another 15% of cable homes, have at least one other receiver connected through a converter. (I base this estimate on my experience as the technical manager for two large cable systems.) I thus conclude that approximately 70% of cable households in September 1993 had at least one television receiver connected through a converter.

79. Industry trends indicate that converter usage is increasing rapidly. In May 1990, the NCTA published a report showing that the percentage of homes with "addressable" converters—converters that enable the viewer to access scrambled or optional programming, such as pay-per-view—had increased from 13% in 1984 to 32% in 1989, and was projected to increase to 80% by 1997. *See* NCTA, "The Future of Television," May 1990, at page 19. Addressable converters offer a variety of attractive features, such as programming convenience and the potential for "interactivity."

80. Recent industry reports confirm that use of addressable converters is increasing rapidly. One source recently reported that "purchases of addressable converters are expected to go up—way up—this year." *Cablevision*, June 20, 1994, at page 42. Another source reported that the converter output of General Instrument Corp., which has the largest share of the converter market, "has doubled from 9,000 to 18,000 units per day." *Cable World*, September 5, 1994, at page 27.

81. Based on these reports and projections, and on my own experience in the cable industry, I estimate that the percentage of television receivers directly connected

to cable wires is currently less than 30%, and that this percentage is likely to decrease substantially over the next few years as more subscribers acquire addressable converters.

May —, 1995

/s/ David Large
DAVID LARGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

ALL PARTIES' JOINT STATEMENT OF UNDISPUTED FACTS

* * * *

131. The FCC's must carry regulations require commercial television stations to elect between retransmission consent and must carry status (the "Election") at intervals of three years.

132. The initial Election date was June 17, 1993.

133. Commercial television stations must make their second Election by October 1, 1996. This Election will take effect on January 1, 1997.

134. Commercial television stations must make their third Election by October 1, 1999. This Election will take effect on January 1, 2000.

* * * *

137. The number of national cable video networks (by type of service) between 1980 and 1994 has been as follows: [1]

---

[1] B/NC: Basic/No Charge.
PRM: Premium or Pay.
PPV: Pay Per View.
CMB: Combination (networks falling in more than one category).

Year	B/C	PRM	PPV	CMB	Total
1980	19	8	0	1	28
1981	29	9	0	0	38
1982	30	11	1	0	42
1983	31	11	1	0	43
1984	36	10	1	0	47
1985	40	9	4	2	55
1986	52	8	5	2	67
1987	59	9	6	1	75
1988	61	8	5	1	75
1989	60	5	4	3	72
1990	61	5	5	4	75
1991	61	7	4	4	76
1992	64	8	4	4	80
1993	78	9	7	5	94
1994 [2]	79	17	8	5	109

Source: N11707.

* * * *

[2] Through September of 1994.

FOR THE UNITED DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

DEFENDANTS' JOINT SUBMISSION OF ADDITIONAL EVIDENCE IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

DOCUMENTARY EVIDENCE

VOLUME VILK.

* * * *

Dated: May 26, 1995

[Exhibit 249]

Local ad sales, cable operators' fast-rising revenue star, is drawing increasingly close scrutiny from system financial managers. The pendulum of attention is swinging from revenue to profits.

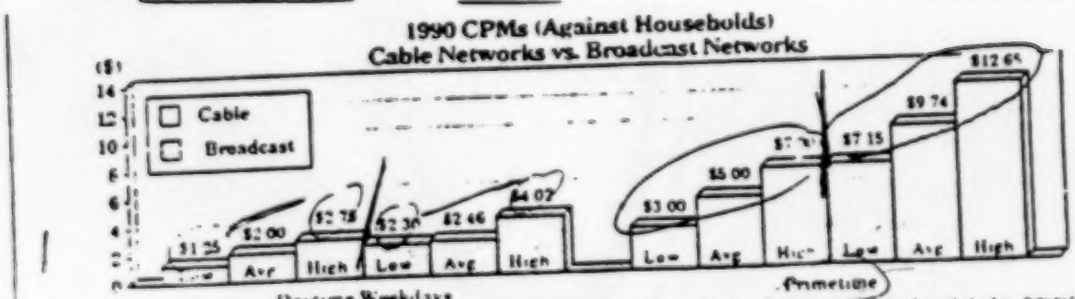
Facing probable rate reregulation, operators are eager to embrace ad sales as a way to boost overall revenue without tapping consumer pocketbooks. First, though, managers want to convince themselves that selling ads is an income business; their bottom-line orientation focuses on net operating margins.

A PKA analysis of cash flow margins suggests the impact of ad sales on an operator's bottom line is solid and getting stronger. Ad sales could account for 6.4% of total MSO cash flow by 1995 vs. 5.3% of total MSO revenue.

Year	Local/ Natl. Spot Ad Rev. (mil.)	Cash Flow Margin	C.F. from Local/Natl. Spot Sales (mil.)	Total Operator Revenue (mil.)	Cash Flow Margin	Total Operator Cash Flow (mil.)	Ad Sales C.F. as % Total C.F.	Ad Revenue % of Total Oper. Rev.
1990	$ 635	45%	$286	$17,784	45%	$ 8,003	3.6%	3.6%
1991	787	48	378	19,668	46	9,047	4.2	4.0
1992	953	51	486	21,573	47	10,139	4.8	4.4
1993	1,124	54	607	23,524	48	11,292	5.4	4.8
1994	1,304	57	743	25,672	49	12,579	5.9	5.1
1995	1,500	60	900	28,045	50	14,023	6.4	5.3

	ROS	Day	Early Fringe	Early News	Prime Access	Prime	Late News	Late Fringe	Total Schedule GRPs	Total Schedule Index
Total Market	100	100	100	100	100	100	100	100	800	100
Cable	74	77	77	81	86	75	81	79	628	78
Non-cable	74	109	109	107	105	110	108	108	830	104

Jan 1990 Local A.C. Nielsen Total Audience Report for Phoenix DMA



Source: Cable CPMs are PKA estimates. Broadcast CPMs reflect SRC, ABC and CBS report the high and the low figures are from A.C. Nielsen. © 1991 CABLE TV ADVERTISING

(continued on next page)

BEST AVAILABLE COPY

IN THE UNITED DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

DEFENDANTS' JOINT STATEMENT OF EVIDENCE BEFORE CONGRESS

PART 1 OF 2

* * * *

Dated: May 26, 1995

DEFENDANTS' JOINT STATEMENT OF EVIDENCE BEFORE CONGRESS

I. EVIDENCE THAT CABLE FUNCTIONS AS A GATEKEEPER.

A. Cable Penetration Into American Television Households Was Increasing

1. *Cable Penetration Rate Was Growing.*

1. The record included evidence that: "Nationally, 37.6% of the TV households had cable service in 1985 compared to 19.1% in 1979. These rates were calculated based on total TV households of 85 million in January 1985, compared to 73.9 million in January 1979 (Arbitron data), and an estimated 32 million basic cable subscribers in March 1985, compared to 14.1 million in January 1979. *Television & Cable Factbook* (1985), *Television Factbook* (1980)." Source: Comments of State Public Broadcasting Networks in MM Docket No. 85-49 at 17, n.22 (Jan. 29, 1986); CR VOL. I.CC, EXH. 166, CR 16245.

2. Congress was advised that: "In November of 1980, only 22% of Americans subscribed to cable. Four years later, that figure had nearly doubled. Today, it stands at over 57% and passes over 80% of U.S. households." Source: *Cable Television Regulation (Part 2): Hearings Before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce*, 101st Cong., 2d Sess. at 102 (May 9 and 16, 1990) (hereafter "Hearings on Cable Television Regulation (Part 2)") (Statement of Thomas L. Goodgame); CR VOL. I.I, EXH. 16, CR 06269.

3. Congress was informed that: "When Congress passed the Cable Act in 1984, cable still was viewed as a

struggling, infant industry. Congress intended, in part, to recognize cable as a full-fledged service, to put it on a solid footing and to promote its growth. In that you have succeeded. In November of 1980, 22.6% of American homes subscribed to cable. In November of 1984, days after final passage of the Act, that number had increased to 43%. Today, nearly 55% of American homes subscribe to cable." Source: *Competitive Problems in the Cable Television Industry: Hearing Before the Subcommittee on Antitrust, Monopolies and Business Rights, of the Committee on the Judiciary*, 101st Cong., 1st Sess. at 304 (April 12, 1990) (hereafter "Hearings on Competitive Problems") (A Special Report from Research & Planning entitled "The Economic Impact of Cable on Broadcasting," by Michael O. Wirth, Ph.D., University of Denver); CR VOL. I.H, EXH. 14, CR 05237.

4. The record included the following: "Between February 1987 and July 1989, the percentage of U.S. television households subscribing to basic cable service increased from 48.7 percent to 56.4 percent. Similarly, the number of homes subscribing to cable as a percentage of homes passed has also increased since deregulation. In January 1987, cable penetration of homes passed was 56.5 percent, but by October 1989, it had increased to 60.8 percent." Source: *Oversight of Cable TV: Hearings Before the Subcommittee on Communications of the Committee on Commerce, Science and Transportation*, 101st Cong., 1st Sess. at 64 (Nov. 16 and 17, 1989) (hereafter "Oversight Hearings") (Statement of James P. Mooney); CR VOL. I.F, EXH. 11, CR 03510.

5. The record included a table showing that the penetration rate for basic cable subscribers (in millions of subscribers) had increased as follows:

1985: 36.7
1986: 39.7
1987: 42.6

1988: 45.7
1989: 49.4
1990: 52.0.

Source: *Report of the Senate Committee on Commerce, Science, and Transportation on S. 12, Cable Television Consumer Protection Act of 1991*, S. Rep. No. 92, 102d Cong., 1st Sess. at 3 (June 28, 1991) (citing Kagan data reported in Time Warner's 1989 Annual Report, p. 29); CR VOL.I.A, EXH. 3, CR 00263.

6. The record included the following information: "Cable household penetration, as a percentage of total [television] households, has steadily climbed throughout this decade:

1980 22.6%
1981 28.3%
1982 35.0%
1983 40.5%
1984 43.7%
1985 46.2%
1986 48.1%
1987 50.5%
1988 53.8%
1989 55.6%

Source: Reply Comments of the National Association of Broadcasters, Appendices, in MM Docket No. 89-600 at 1 (April 2, 1990) (Appendix A); CR VOL. I.X, EXH. 119, CR 14119.

7. The record included the following: "Similarly, cable television, which reached barely 20% of American television homes in 1980, served more than 60 percent of all U.S. households in 1990." Source: *Cable Television Regulation: Hearings on H.R. 1303 and H.R. 2546 Before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce*, 102d Cong., 1st Sess. at 584 (March 20, June 18 and 27, 1991; June

26, 1991) (hereafter "Hearings on Cable Television Regulation") (Statement of Decker S. Anstrom); CR VOL. I.J, EXH. 18, CR 07589.

8. Congress was aware that: "Cable penetration has increased from 37 percent of television households in January 1985 to approximately 61 percent in June 1992." Source: *Cable Television Consumer Protection and Competition Act of 1992*, H.R. Rep. No. 628, 102d Cong., 2d Sess. at 29 (June 29, 1992) (hereafter "1992 House Report"); CR VOL. I.A, EXH. 4, CR 00410.

2. *Cable's Penetration Rate Was Projected to Increase To Seventy Percent Or More.*

9. The record included the following: "Recent estimates place cable penetration in the forseeable future peaking at under 70%." Source: Comments of the Association of Independent Television Stations, Inc., in M.M. Docket No. 90-4 at 102 (Sept. 25, 1991); CR VOL. I.K., EXH.21, CR 08423.

10. The record included the following: "As of July, 1991, 64% of U.S. television households subscribed to cable. Thus almost two-thirds of the nation's homes receive the signals of the stations licensed to local communities over cable system facilities. By the end of this decade, cable penetration could climb to over 70%." Source: Comments of National Broadcasting Company, Inc. on Second Further Notice of Proposed Rulemaking in MM Docket No. 90-4 at 6 (Sept. 25, 1991) (citing "OPP Working Paper," June 1991, p. 73, Table 16); CR VOL. I.Q., EXH. 75, CR 11256.

11. The record included the following: "I think if you take the long view . . . as to the amount of programming that is migrating from broadcast to cable, and updated to pay per view, you see what the goal of cable is. And if you look at the projections that say that 75 percent of

Americans will be subscribing to cable in the year 2000, some 8½ years from now, then you are looking at Americans being cable dependent, if you will, in large measure." Source: *Cable TV Consumer Protection Act of 1991: Hearing on S. 12 Before the Subcommittee on Communications of the Committee on Commerce, Science, and Transportation,* 102d Cong., 1st Sess. at 259 (March 14, 1991) (hereafter "Hearings on Cable TV Consumer Protection Act of 1991") (Statement of Edward O. Fritts); CR VOL. I.I, EXH. 17, CR 06719.

B. Evidence That Cable Acted As A Gatekeeper For These Households. For the more than sixty perent of television households that subscribed to cable by 1992, the only practical way for broadcast signals to reach this audience was through cable carriage. Cable thus operated as a "gatekeeper" for a significant majority of television households.

12. The record included the following: "Once a home is connected to cable, however, that home becomes extremely dependent upon that cable for reception of local television stations. Even though these signals theoretically are available over-the-air, when a local television station is not carried on the cable system, cable subscribers effectively lose their ability to watch it. The cable becomes a gate, over which the local system has control." Source: *Competitive Issues In the Cable Television Industry: Hearing Before the Subcommittee on Antitrust, Monopolies and Business Rights of the Committee on the Judiciary,* 100th Cong., 2d Sess. at 522-23 (March 17, 1988) (hereafter "Hearings on Competitive Issues") (Statement of Gary Chapman); CR VOL. I.C, EXH. 8, CR 01861.

13. The record included the following: "Cable systems are a bottleneck through which television stations increasingly must pass to reach their intended audience, and indirectly, to sell time to advertisers. Estimates of

national cable penetration now range between 52% and 55% of all television households. Many of those households connected to cable television systems do not know how to shift their receivers from the cable systems to over-the-air signals. The difficulty of switching between cable reception and quality reception of over-the-air signals inhibits almost all of the remaining households from making such shifts except in extraordinary circumstances. Thus it is now probably true that on a nationally averaged basis, a television station cannot reach about half its intended audience if it is not carried on cable television systems in its viewing area. Clearly, a television station could not survive long in those circumstances." Source: Comments of Guahan Airwaves, Inc. in MM Docket No. 90-4 at 3-4 (Feb. 14, 1991); CR VOL. I.O, EXH. 42, CR 10098-99.

14. Congress was informed that: ". . . more than 50 percent of this country's television households now depend on a single entity (*i.e.*, their local cable company) to deliver all of the television channels they receive. Although some of these consumers can still receive their local television signals over-the-air, they are unlikely to do so except during those periods in which their cable service is not working. This means that local television broadcasters must either be carried by the cable system in their local market or be faced with surviving economically with a potential audience which is 40 to 50 percent less than it would otherwise be." Hearings on Competitive Problems" at 316 (April 12, 1990) (Statement of Edward O. Fritts); CR VOL. I.H., EXH. 14, CR 05249.

15. The record included the following commentary: "For a variety of reasons, households connected to cable systems switch to over-the-air broadcast reception only in extremely rare circumstances. Very few cable households still have the outside antenna systems necessary for quality reception of broadcast signals. Even where cable households possess such systems, realistic difficulties im-

pede switching between cable and broadcast reception, and those difficulties make such switching psychologically unappealing. Most importantly, the cable television cable must be disconnected from the receiver input terminal, and a cable hooked up to the broadcast reception antenna must be connected to the terminal. Many cable households are not even aware, or are only dimly aware, of the possibility that they can shift their receivers from cable to broadcast reception." Source: Further Comments of KTGM-TV in MM Docket No. 90-4 at 11 (Sept. 25, 1991); CR VOL. I.P., EXH. 67, CR 10898.

16. The record also indicated that: "For all practical purposes, 98 percent of TV households served by cable—or a majority of all TV households, in most markets—do *not* have a television signal 'available' through any means other than cable; that is, almost no homes with cable have a separate antenna for over-the-air reception and an A/B switch to access the antenna." Source: Comments of the Motion Picture Association of America, Inc. in MM Docket No. 90-4 at 6 (Sept. 25, 1991); CR VOL. I.P., EXH. 66, CR 10862.

17. Congress was advised that: "Cable systems have enormous power to control the media marketplace in the areas they serve through the access to cable retransmission that they provide to broadcasters. They have the power to deny access completely, and they have the power to manipulate access through channel positioning." Source: "Hearings on Cable Television Regulation" at 231 (March 20, June 18 and 27, 1991; June 26, 1991) (Association of National Advertisers, Inc.; letter and statement dated 3/19/91 to Chairman Markey); CR VOL. I.J., EXH. 18, CR 07237.

18. The record included the following: "The Congress should be concerned with horizontal concentration in the cable industry. Each cable operator is a local monopoly gatekeeper." Hearings on Cable Television Regulation" at 866 (March 20, June 18 and 27, 1991;

June 26, 1991) (Statement of James B. Hedlund); CR VOL. I.J., EXH. 18, CR 07870.

19. Submissions to the record included the following: "The problem is cable television today is quite simple. It is a problem that is common to the entire nation to all cable subscribers, and to all programmers who wish to use cable technology to reach these subscribers. That is: the cable television wire is a natural monopoly. The person who owns that wire is a monopolist. And under the current structure of the federal Cable Act, the cable monopolist is essentially unregulated. Cable operators extract monopoly profits from consumers, and they extract monopoly profits from television programming services. The cable wire transmission facility is the basis for that monooply. It is the 'electronic gateway' to the television sets of this nation, and only one person holds the key to that gate to each household." Source: *Cable Television Regulation (Part 1): Hearings Before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce*, 101st Cong., Sess. at 83 (March 1 and April 19, 1990) (hereafter "Hearings on Cable Television Regulation (Part I)") (Statement of Paul G. Berra); CR VOL. I.G., EXH. 13, CR 04281.

20. The record included the following: "It must be emphasized that, in WLIG's experience, cable is a monopoly gatekeeper for many households on Long Island. It is impossible to reach those households without access to the cable system. Since there is only one cable system in each community, and no practical prospect for the development of additional competing cable systems, WLIG must gain carriage to the existing cable systems or be frozen out of a tremendous portion of its natural market." Source: Comments of WLIG in MM Docket No. 85-349 at 16 (Jan. 29, 1986); CR VOL. 27, EXH. 155, CR 15690.

21. The record indicated that: "Cable does present a most serious public policy problem, because in this dec-

ade it will be *the* broadband monopoly way into two thirds of the U.S. TV households. A proposed cable programmer or a competing UHF independent TV station cannot gain access to these homes except through cable, which controls 30-50 or more channels into the home." Source: Comments of Action for Children's Television in MM Docket No. 89-600 at ii (March 1, 1990); CR VOL. I.T., EXH. 106, CR 12489.

II. EVIDENCE THAT CABLE HAD MONOPOLY POWER IN LOCAL TELEVISION MARKETS.

A. Cable Market's Power. In almost all local communities in the United States, there were no comparable substitutes for cable. A broad range of empirical evidence indicated that as a result, cable was able to exercise monopoly power.

22. The record included the following: "Based upon an analysis of 153 recent sales of cable systems, Shooshan and Jackson Inc. have calculated q-ratios for 1986. Their study estimates the q-ratio for the cable industry as of December 1986 at 2.81. Obviously in light of additional increases in the per subscriber acquisition prices in 1987, the value of the q-ratio has increased substantially as well. The study concludes that the explanation for the high q-ratio is that the cable industry has excessive market power. Thus, these analysts conclude that although there are many potential and actual alternatives to cable, these alternatives do not adequately constrain the monopoly power of cable systems." Source: "Hearings on Competitive Issues" at 210-11 (March 17, 1988) ("Does Cable Television Really Face Effective Competition?" by Janusz A. Ordover, Professor of Economics, New York University, with the assistance of Yale M. Brunstein, Professor, University of California at Berkeley); CR VOL. I.C., EXH. 8, CR 01549-50. *See also* Comments of the Wireless Cable Association, Inc. in MM

Docket No. 89-600 (March 1, 1990); CR VOL. I.T., EXH. 102, CR 12059.

23. The Justice Department indicated: " 'The information before the Commission suggests strongly that neither conventional television broadcast nor any of the alternative technologies presently available are close enough substitutes for basic and pay cable television services to prevent the providers of such cable services from exercising some degree of market power. However, the existence and extent of this market power may vary considerably in local cable markets depending, among other things, on the number and quality of over-the-air television signals available to the community and the number of non-local channels of information and entertainment made available over the cable system. In areas that do not receive clear television signals, the ability to provide clear television signals would, by itself, give the local cable system some degree of market power. Since 1984, however, basic cable tiers have been expanded to carry many channels of non-local programming. Even where consumers get good over-the-air television reception, the ability to provide a relatively large number of non-local signals is likely to give the only provider of such services some degree of market power. That market power may be derived from the local cable system's ability to provide the type of programming currently offered on the basic service tier as well as its ability to provide pay cable services, for there does not appear to be a close substitute for either type of cable services.' " Source: *Report of the Senate Committee on Commerce, Science, and Transportation on S. 12, Cable Television Consumer Protection Act of 1991*, S. Rep. No. 92, 102d Cong., 1st Sess. at 11 (June 28, 1991) (hereafter "1991 Senate Report") (quoting Reply Comments of the US DOJ in MM Docket No. 89-600, p. 2-3); CR VOL. I.A., EXH. 3, CR 00271.

24. The Justice Department also reported that: " 'Clearly, the Q ratios for the cable industry discussed

above are subject to some dispute. However, given the magnitude of the Q ratios, and the likely size of any corrections that should be made to them, it is likely that the Q ratios for cable firms are greater than should be expected in industries subject to effective competition. Therefore, these studies provide some support for the conclusion that cable firms possess some degree of local market power.'" Source: "1991 Senate Report" at 10-11 (June 28, 1991) (quoting Reply Comments of the United States DOJ in MM Docket No. 89-600, p. 23); CR VOL. I.A., EXH. 3, CR 00270-71.

25. The record included the following: "There is no question that cable has monopsony power. There is extensive evidence of this power by various measures. One such measure, the q ratio, evaluates the market power of an industry by comparing the ratio of the market value to the cost of replacing its tangible assets. This yields a measure of excess of the value placed on the firm by investors over the cost of duplicating identical facilities, representing monopoly/monopsony profits. When this excess occurs, other firms could be expected to enter the market, if possible, to take advantage of these excess profits. Consequently, in a perfectly competitive market, the q ratio would equal unity. In sharp contrast, recent studies by Shooshan & Jackson, Inc. and Paul W. MacAvoy estimated cable's q ratio at 3.8 and 4.3, respectively. Other than some generalized criticisms of the applicability of Tobin's q by an academic consultant, the cable industry has not refuted those studies." Source: Appendices to Testimony of James B. Hedlund, President, Association of Independent Television Stations, Inc. Before the Subcommittee on Telecommunications & Finance, Committee on Energy & Commerce, U.S. House of Representatives at 2 (May 16, 1990) (INTV, "Vertical Integration in the Cable Industry: The Problem and the Solution," March 29, 1991); CR VOL. I.M., EXH. 24, CR 09155.

26. The record included the following research: "This study demonstrates that the q ratio for the cable industry is much higher than that for comparable competitive industries. In particular, the best estimate of cable's q ratio at the end of third quarter 1989 is 4.30. This estimate can be compared to the competitive norm of 1.00 or to the economy-wide q, estimated to be 0.89. The only plausible explanation for the relatively high q ratio is that the cable industry has substantial capitalized profits from operations in local markets where it possesses monopoly power." Source: Comments of the United States Telephone Association in MM Docket No. 89-600 at 2-3 (March 1, 1990) (Appendix 5, Paul MacAvoy, Tobin's q and the Cable Industry's Market Power (Feb. 28, 1990)); CR VOL. I.V., EXH. 112, CR 13438-39.

27. The following information was also provided to Congress: "Analysis of the market price for cable systems, compared to the actual cost and reasonable profits associated with cable services, demonstrates that cable systems are earning large monopoly profits. If healthy competitive forces were disciplining the cable market, the revenue necessary to yield a reasonable profit would be less than half of what is currently paid by consumers in their cable rates." Source: "Hearings on Cable Television Regulation (Part I)" at 145 (March 1 and April 19, 1990) (Statement of Gene Kimmelman); CR VOL. I.G., EXH. 13, CR 04343.

28. The record included the following: "Out of over 7000 cable systems in the US, only 53 operate with a competing cable company. In those 53, rates, on average are 50% lower than the rates of those without competition." Source: "Hearings on Cable TV Consumer Protection Act of 1991" at 406 (March 14, 1991) (Statement of Richard Gamberg); CR VOL. I.I, EXH. 17, CR 06864.

29. Congress was informed that: "Econometric studies show that, if cable companies were subject to the pric-

ing pressure of a fully competitive market, cable rates would be about 50 percent lower and consumers would save approximately $6 billion per year." Source: "Hearings on Cable Television Regulation" at 710 (March 20, June 18 and 27, 1991; June 26, 1991) (Statement of Gene Kimmelman); CR VOL. I.J., EXH. 18, CR 07715.

30. The record also indicated that: "It is difficult to obtain direct data on the profitability of cable operators or programmers because they are frequently subsidiaries of holding companies. However, an analysis of purchase prices for cable systems indicates very large monopoly profits inherent in the industry. Although there is quibbling over methodology, cable systems are clearly selling at several times their reproduction costs. That is, if barriers to entry could be removed and fair access to programming could be ensured competitors could enter and build systems at less than half of what existing systems are selling for. The growth in these monopoly profits since deregulation is also clear (see Exhibit 10). In 1983 reproduction costs were estimated to be approximately $600 per subscriber. Sales prices on cable systems were in the range of $900 to $1200. Estimates of today's reproduction costs are in the range of $600 to $1000. Sales prices of cable systems have jumped into the range of $2200 to $3000." Source: "Hearings on Competitive Problems" at 91-92 (April 12, 1990) (Statement of Gene Kimmelman); CR VOL. I.H., EXH. 14, CR 05024-25.

B. Evidence That Cable Systems Face No Competition From Other Cable Operators.

1. *More Than 99% Of All Communities Were Served By A Single Cable Operator.*

31. Congress was informed that: "Some argue that cable is a natural monopoly in the economic sense—that it simply is uneconomical for two systems to operate in the same area. Regardless of whether or not cable is a

natural monopoly, in many communities cable has been granted a legal monopoly by the local franchising authority. As a result, competition among cable systems is extremely rare. Presently, there are perhaps as many as 50 franchised cable systems (out of a nationwide total of approximately 6,500) that face competition from other franchised systems." Source: *Must Carry: Hearing Before the Subcommittee on Communications of the Committee on Commerce, Science, and Transportation,* 101st Cong., 1st Sess. at 40 (Oct. 25, 1989) (hereafter "Hearings on Must Carry") (Statement of Edward O. Fritts); CR VOL. I.F, EXH. 12, CR 04050.

32. The record included the following: "Virtually 100 percent of the cable systems in the cities and towns of this country are local monopolies. Less than one percent of the communities in the United States have overbuilds (that is, more than one cable system), and even then, almost none of those communities has cable systems which actually compete with one another in the same neighborhoods of that community." Source: "Hearings on Competitive Issues" at 696 (March 17, 1988) (Statement of John Siegel); CR VOL. I.C, EXH. 8, CR 02035.

33. The record indicated that: "Of the 7,000 communities in America with cable television service, it has been estimated that approximately 30 or 4/10 of 1% are served by competing systems. Stated another way, approximately 99.6% of all cable subscribers are served by monopoly systems." Source: "Hearings on Competitive Issues" at 544 (March 17, 1988) (Statement of John Siegel); CR VOL. I.C, EXH. 8, CR 01883.

34. The record included the following: "Over 99 percent of the cable systems in this country do not face competition from another cable system." Source: "Hearings on Cable Television Regulation (Part I)" at 198 (March 1 and April 19, 1990) (Joint Statement); CR VOL. I.G, EXH 13, CR 04396.

35. Congress was informed that: "The fact is that cable is an entrenched monopoly in most American com-

munities, passing over 80% of all U.S. homes. Less than 1% of cable companies face any direct competition from other cable systems. In fact, only 52 of the more than 9,400 cable systems nationwide are 'overbuilt.' Its plant is built and its subscriber base is established. We have already described its preferential relationship with certain program suppliers. Any competitor to such an existing operation faces great hurdles." Source: "Hearings on Cable Television Regulation (Part 2)" at 115-16 (May 9 and 16, 1990) (Statement of Thomas L. Goodgame); CR VOL. I.I, EXH. 16, CR 06282-83.

36. The record indicated that: "More than 99 percent of the cable systems in this country do not face competition from another cable system; and in most cities, alternative multichannel video programming distributors are not yet viable competitors." Source: "Hearings on Cable Television Regulation" at 150 (March 20, June 18 and 27, 1991; June 26, 1991) (Statement of Xavier L. Suarez); CR VOL. I.J, EXH. 18, CR 07156.

37. The following was submitted in the record: "Although there are 8,000 plus cable systems in this country, only about 40 communities are at least partially overbuilt by a competing cable system, with approximately 50 additional communities having franchised potential competitors." Source: Comments of the National Association of Broadcasters in MM Docket No. 89-600 at 18 (March 1, 1990); CR VOL. I.T, EXH. 104, CR 12240.

38. The record included: "There are approximately 8,000 cable systems in the United States, passing 86 percent of the approximately 89 million television households. By one commentator's count, there are a total of only 49 overbuilds—32 overbuilds of 50 percent or more of a franchise area, and 17 instances of overlapping systems or overbuilds of less than 50 percent of a franchise area. Paul Kagan Associates, *Cable TV Franchising* (Oct. 17, 1988), at 1 ('Kagan'). The total number of subscribers

covered by overbuilds is *de minimus* in relation to total subscribers nationwide." Source: Comments of the City of New York, et al. in MM Docket No. 89-600 at 38-39 March 1, 1990); CR VOL. I.U, EXH. 110, CR 13119-20.

39. The record also indicated that: "More significant than the relatively small number of existing overbuilds, however, is the number that have failed. Kagan's 1988 survey reveals that 61 overbuilds are no longer in existence. Kagan at 1. Touche Ross & Co., noted in 1987 that, of the 65 areas where it found that overbuilds were authorized, almost one third were never constructed; one half were constructed, but one of the operators subsequently left the market or was purchased; and, of the remaining 13, only seven had been in existence for more than three years. Touche Ross & Co., *Report on Overlapping Cable Franchise Study for Dade County, Florida,* (October 7, 1987), p. 38 ('Dade County Study')." Source: Comments of the City of New York, et. al. in MM Docket No. 89-600 at 39-40 (March 1, 1990); CR VOL. I.U, EXH. 110, CR 13120-21.

40. Congress was aware of the following information: "According to information submitted to the Committee by the cable industry, out of over 11,000 cable systems, there are only 53 communities where there is currently some overbuild. In 36 of these, there is the potential for a total overbuild. In those communities where there are two competing cable systems, the rates are approximately 20 percent lower and the per-channel prices can be as much as 50 percent lower than in communities with only one cable system. Further, there are 132 communities where second franchises have been awarded or are under study. However, in 62 communities where the threat of an overbuild once existed, there have been mergers of the two cable systems. This scarcity of overbuilds is to be expected in light of the strong national monopoly characteristics of cable systems." Source: "1991 Senate Report" at 13 &

n.35 (June 28, 1991) (citations omitted); CR VOL. I.A, EXH. 3, CR 00273.

2. *There Was No Reasonable Prospect That Cable Operators Would Face Competition From Other Cable Systems.*

41. The record indicated that: "Moreover, in almost half of the areas found to have competing cable systems in a 1987 study, the competing system has since either left the market or been purchased by the other operator, ending the competition. Comments of Continental Cablevision at 56-57." Source: Comments of NAB in MM Docket No. 90-4 at 21-22 (April 6, 1990); CR VOL. I.N, EXH. 38, CR 09916-17.

42. Congress received the following testimony: "And I believe that it is not economically viable to sustain two wires into the home providing, essentially, equivalent services. Because all you do there is double the capital cost, double the operating expenses, or raise them by 150 percent and split the revenues in half." "1991 Senate Report" at 13 (June 28, 1991) (quoting testimony of John Malone, President and CEO of TCI, in "Oversight of Cable TV," p. 166); CR VOL. I.A, EXH. 3, CR 00273.

43. The record also included the following: "John Mansell of Paul Kagan Associates estimates that 24 to 36 franchised cable systems currently face substantial overbuild competition (not including SMATV competition). In his opinion, an additional 100 to 150 systems face the possibility of overbuild competition in the future. Since there are currently 8,000 U.S. cable systems (*1988 Broadcast/Cable Yearbook*, at D-3), the vast majority of cable systems do not (and likely will not) face direct competition from another cable company in the next 10 years." Source: "Hearings on Competitive Problems" at 317 n.2 (April 12, 1990) (Statement of Edward O. Fritts); CR VOL. I. H., EXH. 14, CR 05250.

44. The record included the following: Moreover, while it was once believed that consumers would have multiple choices of cable companies from which to purchase service, economics suggest that for most households, there will be only one cable system serving them. One study estimates, for example, that for a community with density of 90 homes per mile, the 'cost penalty' of an additional cable system would be $5.00 per subscriber. Based on this analysis, the authors, Malarkey-Taylor Research, conclude that 'an overbuild may be economically viable, for example, in a high density, high cable demand market, where franchise and other requirements do not mandate a state-of-the-art system.' Studies by others confirm that it is unlikely that there will be significant overbuilds." Source: Cable Television Regulation (Part 2): Attachments to NAB Testimony in Hearings Before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce, 101st Cong., 2d Sess., Appendix A at 2 (May 16, 1990) ("First Amendment Analysis of a Must Carry Statute," by P. Cameron Devore, et al.); CR VOL. I.L, EXH. 22, CR 08812.

45. The record included the following: "These predictions are borne out by at least one study which estimated that the 7,000 communities in America with cable television service, approximately 30, or 4/10 of 1% are served by competing systems. Experts believe that less than 1% of cable systems are likely to see overbuilds and most of those will be in small, nonurban communities. [Citing Communications Daily, 'Fear of Cable Overbuilds Called More Threat Than Reality,' October 23, 1989, p. 5.] This means that 99% of all cable subscribers are likely to be served by only one system." Source: Cable Television Regulation (Part 2): Attachments to NAB Testimony in Hearings Before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce, 101st Cong., 2d Sess., Appendix A at 2-3 (May 16, 1990) ("First Amendment Analysis of a

Must Carry Statute," by P. Cameron Devore, et al.); CR VOL. I.L, EXH. 22, CR 08812-3.

46. The following information was submitted: "First, it is widely recognized that cable systems currently enjoy the central characteristics of a natural monopoly, so that the provision of cable services can be done at the minimum cost only when a single system operators in a service area. Within a given area, average costs per channel is increased. While empirical estimates of this relationship are crude, Owen and Greenhalgh found that if two cable systems were built in a given area with 28 channels each, the cost per subscriber would be about 50% greater than for a single 56 channel system. Higher costs are due to the duplication of facilities, where the marginal costs of upgrading the capacity of an existing system is relatively low. It cannot be expected, therefore, that meaningful competition will develop among competing, duplicate cable systems on a widespread basis. A single cable system will offer a unique outlet for local stations, and in many instances there are no equivalent alternatives for the broadcast station desiring access to cable viewers." Source: Reply Comments of the National Association of Broadcasters, Appendices, in MM Docket No. 89-600, Appendix B-2 at 7-8 (April 2, 1990); CR VOL. I.X, EXH. 119, CR 14228-29.

47. The record included the following:

> "While in theory a second independently-owned wire (or fiber optic cable) to the home would be the ideal solution to the monopoly power most cable franchisees currently enjoy, the possibility of achieving such a result on a wide scale is highly problematic.
>
> First, as NTIA has correctly observed, incumbent cable operators enjoy tremendous advantages over any new potential competitor, be it another cable operator or a telephone company.

> Cable firms control the transmission mode of preference (passing over 80 percent of television homes, with 50 percent of all television homes using coaxial cable for their television viewing); they hold valuable franchises which, in the vast majority of markets, insulate the cable operator from direct competition; they have existing contractual arrangements with program networks; they have human assets and expertise in programming management, and advertising sales.'
>
> Second, as pointed out by a managing director of Drexel Burnham Lambert, 'you have to have deep pockets and a strong stomach to overbuild [TCI] and hand in there for 15 years.' Third, a number of studies have suggested that in many markets, while short term competition between cable systems with a resulting decline in rates is possible, ultimately one company will end up buying the other out and then will raise its prices to even higher levels to make up for the losses caused by the competition." [Citing Eli Noam, 'Economics of Scale in Cable Television: A Multiproduct Analysis,' published in *Video Media Competition: Regulation, Economics and Technology*, (Eli Noam, ed.) at 93-120; 'Economics Analysis of Cable System Overbuilds,' Malarkey-Taylor Research, January 1987; *New Dominion Magazine*, December 1989 (citing Touche Ross study published in *Consumer Research*)]."

Source: Comments of the National Association of Broadcasters in MM Docket No. 89-600 at 16-17 (March 1, 1990); CR VOL. I.T, EXH. 104, CR 12238-39.

48. The following study was included in the record: "Only those overbuilt systems with exceedingly high basic service penetration rates (greater than 80%) were found to profess any degree of economic viability for both operators." Source: Comments of the City of Los Angeles,

CA in MM Docket No. 89-600 at Exh. 3 (figure 1(f)) (March 1, 1990) (Declaration of Carl Pilnick) (summarizing study by George L. Paage, "CATV Systems Overbuild Considerations Relevant to Liberty Cable Television's Application for Franchise Renewal."); CR VOL. I.U, EXH. 108, CR 12953.

49. The record included the following:

> "After assessing various likely cost, demand, and revenue scenarios, I concluded in the *Overbuild Study* that a cable overbuild could be economically viable *only* where at least three or four of the following four conditions exist simultaneously:
>
> '1. A market has high density (*i.e.*, high ratio of homes-per-mile of cable plant);
>
> 2. A market has high inherent demand for cable television (typically occurring where over-the-air broadcast reception is poor or the number of over-the-air broadcast stations is small);
>
> 3. The fixer capital costs (start-up and construction costs) are low relative to the size of the cable system; and
>
> 4. The incumbent operator has poor cable service and/or relatively high cable rates are charged by the incumbent operator.'
>
> Because three or four of these factors rarely coexist in a single market, the *Overbuild Study* concluded that a cable overbuild is not likly to be profitable or economically feasible under the conditions that commonly prevail in most markets. Overbuilds are generally infeasible due primarily to the natural monopoly characteristics of cable systems. High fixed capital costs and relatively low variable operating costs per subscriber lead to decreasing total costs per subscriber as the subscriber base expands within a given geographic area. Since average cost per

> subscriber decreases as the number of subscribers increases, two cable systems serving the same geographic area will each incur substantialy higher costs per subscriber than one cable system."

Source: Comments of the City of Los Angeles, CA in MM Docket No. 89-600 at 4-5 (March 1, 1990) (Declaration of Dr. Samuel H. Book at ¶ 6); CR VOL. I.U, EXH. 108, CR 12850-51.

50. The record included the following: "The *Overbuild Study*'s conclusion that overbuilds are not economically feasible in most markets is consistent with actual experience nationwide in the cable industry, where overbuilds are a rare phenomenon. Malarkey-Taylor tracking surveys of overbuilds in the United States indicate that out of a total of approximately 7000 cable systems in the nation, there have been fewer than a half dozen long-term (over 5-years) fully overbuilt cable systems. None of these exist in the Los Angeles area or in California, nor do any exist in major urban inner city areas." Source: Comments of the City of Los Angeles, CA in MM Docket No. 89-600 at 5 (March 1, 1990) (Declaration of Dr. Samuel H. Book at ¶ 7); CR. VOL. I.U, EXH. 108, CR 12851.

51. The record indicated: "Over 99% of the cable systems in the United States operate on an exclusive basis. Even in the few areas where overbuilds are either existence or realistically anticipated, the actual number of subscribers who could benefit is minuscule. The typical overbuild occurs only in isolated areas of new subdivision construction, or at the boundaries of franchise services areas, affecting only a fraction of residents. Thus, even in areas touted as overbuild areas, the scope of actual competition is extremely limited." Source: Comments of the United States Telephone Association in MM Docket No. 89-600 at 44 (March 1, 1990); CR VOL. I.V, EXH. 112, CR 13250.

C. Further Evidence Confirming That Cable Operators Function As Local Monopolies.

52. Congress was informed that: "No less an authority that R.E. (Ted) Turner has averred in a federal court complaint that cable operators exercise monopoly power over essential facilities." Source: "Hearings on Cable Television Regulation" at 872 (March 20, June 18 and 27, 1991; June 26, 1991) (Statement of James B. Hedlund) (citing *Cable News Network, Inc. v. Satellite News Channels,* Civil Action File No. C83-430 A, U.S. District Court N.D. Ga., (Complaint filed March 3, 1983); CR VOL. I.J, EXH. 18, CR 07876.

53. The record included the following: "TCI admits that even with over-the-air TV, video tapes, sporting events and movies available in a community, 'the cable system can still have monopoly power in the economic sense that it does not face the full effect of competition because it is the sole source of cable services.'" Source: "Hearings on Cable Television Regulation" at 709 (Statement of Gene Kimmelman) (quoting Reply brief for TCI at footnote 70, *TCI v. Commission of Internal Revenue* 95 T.C. 36 (Nov. 7, 1990) (Dkt. No. 268-89); CR VOL. I.J., EXH. 18, CR 07706.

54. There was evidence that: "Over 99 percent of the cable systems in this country do not face competition from another cable system; furthermore, alternative multichannel video programming distributors are not yet viable competitors to cable systems in most cities." Source: "Oversight Hearings" at 191 (Statement of James Sharp); CR VOL. I.F, EXH. 11, CR 03639.

55. The record included the following: "Cable's local monpoly power and its impreviousness to local marketplace conditions has not gone unnoticed by the investment community. For example, Bear, Stearns & Co. has referred to the local cable franchise area as a 'monopolistic annuity,' while Gordon Crawford of Capital Guardian Research termed it a 'quasi-monopoly with much price

flexibility.' Steven Rattner at Morgan Stanley has noted that local cable operators enjoy a 'unique franchise,' 'have enormous leverage' in what they can extract for carriage on their system, and 'are still the gateway to the market.' John Suhler, of Veronis, Suhler & Associates, attributed the 26.1% increase in revenues of 44 publicly reporting cable companies in 1988 to the fact that they operate in a less competitive environment. Thomas Hazlett stated that the fact that cable's market values are often now in excess of three times capital suggests 'that substantial monopoly profits are captialized in the typical cable system.' A prime example is a Tucson, Arizona cable franchise which sold for $62 million several years ago, sixteen months later for $112 million, and is now on the market for $160 to $180 million." Source: Comments of the National Association of Broadcasters in MM Docket No. 89-600 at 10-12 (March 1, 1990); CR VOL. I.T, EXH. 104, CR 12232-34.

56. The record included the following: "No alternative video delivery technology is a ready substitute for cable television. Cable offers a unique combination of local control and multiple programming channels. All other video delivery systems involve a compromise or trade-off in one respect or the other. Broadcast television, for example, while a locally-controlled service, provides only one channel per station and rarely more than a half dozen viewable signals. Even in the top 50 markets, the total number of market stations ranges from seven to 26, and only 31 markets have as many as ten stations." Source: Comments of INTV in MM Docket No. 90-4, "In the Matter of Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates" at 14 (April 6, 1990); CR, VOL. I.N, EXH. 37, CR 09835.

57. The following information was submitted: "As is discussed in more detail, infra, one of the nation's largest operators of coaxial cable systems recently conceded in a complaint filed with the United States District

Court that '[e]ach cable operator is a monopolist in its local market or possesses a monopoly share approaching 100 percent.' Viacom International Inc. v. Time Incorporated, Complaint, 89 Civ. 3139 (SDNY, filed May 9, 1989)." Source: Comments of the Wireless Cable Association, Inc. in MM Docket No. 89-600 at 13 n.24 (March 1, 1990); CR VOL. I.T, EXH. 102, CR 12077.

58. The record included the following: "Wall Street accurately describes the bottom line. '. . . TCI's ability to command equity interest in various facets of the home entertainment and communications business; volume discounts for programming; expectations that local advertising will boost cash flow growth; expectations that cable TV will siphon programming, viewers and advertising from over-the-air broadcasters; . . . Over the long term, we believe TCI is an attractive stock because it dominates a monopoly business that is still growing . . .' County NATWEST USA, The NATWEST INVESTMENT BANKING GROUP, November 8, 1989." Source: Statement of Milton Maltz, Chairman of the Board & CEO, Malrite Communications Group, before the FCC on Feb. 12, 1990 (Los Angeles, California), in MM Docket No. 89-600 at 3-4; CR VOL. I.S, EXH. 93, CR 11778-79.

59. The record indicated that: "[T]he largest MSO, TCI, has been found guilty of monopolizing at least one geographic market and currently faces charges of monopolizing several others." Source: "Hearings on Competitive Issues" at 32 (Statement of William Finneran) (citing *Central Telecommunications, Inc. v. TCI Cablevision Inc.*, 800 F.2d 711 (8th Cir. 1986), *cert. denied* 107 S. Ct. 1358 (1987); *H.R.M., Inc. v. Tele-Communications, Inc.*, 653 F. Supp. 645 (D. Colo. 1987); CR VOL. I.C, EXH. 8, CR 01371.

D. Evidence That Cable Had Exploited Its Monopoly Position By Escalating Prices For Cable Service.

60. The record includes the following: "deregulation did not bring lower prices to a mass of cable subscribers, as it did in the airline industry. In fact, subscription prices appear to have risen substantially even after making allowance for expansion of programming included in basic service." Source: "Hearings on Competitive Issues" at 222 ("Dos Cable Television Really Face Effective Competition?" by Janusz A. Ordover); CR VOL. I.C. EXH. 8, CR 01561.

61. Congress was told that: "The August 1989 GAO Study confirms the inappropriateness of the FCC's standard, and demonstrates that the absence of rate regulation allows cable operators to use their monopolistic powers to charge consumers unfairly for the provision of cable services. The study shows that cable operators have increased rates by 29 percent per subscriber for basic cable service between December 29, 1986 (when basic cable rates were deregulated) and October 1988. Those increases are approximately three times the increase in the Consumer Price Index during that same time period. Further, 45 percent of the operators reported increases in excess of 30 percent and almost one-fifth reported increases of more than 50 percent. Such substantial rate hikes would not have been possible in a marketplace subject to true competition or rate regulation." Source: "Hearings on Cable Television Regulation (Part I)" at 316-17 (Statement of Charles A. DeVaney); CR VOL. I.G, EXH. 13, CR 04513-14.

62. The record included testimony that: ". . . since deregulation basic rates have risen on average at least two to three times the rate of inflation. Cable operators attempt to camouflage these rate increases by adding new channels to their basic tier of service, forcing consumers to pay excessive rates for programming they may

not purchase if it were not wrapped into the basic tier. Even for consumers who desire the new channels added to the basic tier, rate hikes have far exceeded the added cost of this new programming." Source: "Hearings on Cable Television Regulation (Part I)" at 144-45 (Statement of Gene Kimmelman); CR VOL. I.G, EXH. 13, CR 04342-43.

63. The record included the following: "A more recent study undertaken by the United States Telephone Association ("USTA") indicates substantial increases during the last several years. For example, the study found that over the period 1986-89, basic cable rates increased an average of 68 percent. Over one-fifth of the cities surveyed experienced basic cable rate increases in excess of 100 percent, and over two-thirds of the cities surveyed experienced basic cable rate increases in excess of 50 percent." Source: "Hearings on Cable Television Regulation (Part I)" at 317 (Statement of Charles A. DeVaney); CR VOL. I.G, EXH. 13, CR 04514.

64. The record included the following: "Cable rates rose about 13 percent last year, more than twice the rate of inflation and more than three-times the level of increase experienced during the time when cable was regulated. These price hikes come on the immediate heels of the more than 40 percent basic rate increases consumers experienced during the first three years of cable deregulation." Source: "Hearings on Cable Television Regulation" at 705 (Statement of Gene Kimmelman); CR VOL. I.J, EXH. 18, CR 07710.

65. Congress was informed that: "In sum, the available evidence indicates that cable television did not face effective competition from broadcast television at prices that prevailed prior to deregulation. As a result, MSOs were able to significantly increase subscription rates for basic cable services, as shown later in the testimony, without significantly increasing the quality of basic services to cable subscribers." Source: "Hearings on Competitive Problems" at 486 (Statement of Janusz A. Ordover); CR VOL. I.H, EXH. 14, CR 05419.

66. The record included the following: "In a more recent survey conducted by the National League of Cities of 233 franchising authorities covering 274 franchises serving 4.68 million subscribers, it was found that 82.6 percent of the cable operators surveyed increased their basic rates. In 40.4 percent of the rate increases, the number of services included in basic services also increased. In the other 42.3 percent where the number of services was not increased, the average increase of basic rate was 27.5 percent. Of the 42.3 percent that did not increase the number of services, however, 17.3 percent decreased their pay service rates. Of the remaining cable operators surveyed, 14.4 percent did not change their basic service rates while only 2 percent reduced their rates. Even a recently released study of the deregulated cable industry by National Cable Television Association found that, in a sample of 598 responding cable systems which reach 16% of cable households, the average basic rate increased by 10.6% since January 1987. NCTA's estimates appear to be very low in comparison with those reported by other sources." Source: Comments of INTV in MM Docket No. 90-4, "In the Matter of Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates" at 26-27 (April 6, 1990) ("Does Cable Television Really Face Effective Competition?" by Janusz Ordover); CR VOL. I.N, EXH. 37, CR 09869-70.

67. The record also indicated that: "Cable prices in 1990 increased at more than twice the rate of inflation, for the highest rate of increase since cable rates were included in the Consumer Price Index." Source: "Hearings on Cable Television Regulation" at 755 (Statement of Edward O. Fritts); CR VOL. I.J, EXH. 18, CR 07759.

68. Congress was also aware of the following: "The Committee also notes that an economist in the Antitrust

Division of the U.S. Department of Justice recently determined that at least 45 to 50 percent of basic cable rate increases since deregulation are due to the exercise of market power by cable operators." (citing Robert Rubinovitz, 'Market Power and Price Increases for Basic Cable Service Since Deregulation.' Economic Analysis Group, Antitrust Division, U.S. DOJ. August 6, 1991). Source: "1992 House Report" at 42; CR VOL. I.A, EXH. 4, CR 00421.

III. EVIDENCE THAT IN ADDITION TO LOCAL MONOPOLIZATION, LARGE MULTIPLE SYSTEM OPERATORS WERE BECOMING INCREASINGLY DOMINANT IN THE CABLE INDUSTRY. These firms not only acted as "gatekeepers" in local communities; as a result of consolidations and mergers, they were gaining increasing shares of the national market. This enabled companies like Tele-Communications, Inc. to demand equity shares and other very favorable terms as a prerequisite for granting access to subscribers served by their cable systems.

A. Evidence of Substantial Horizontal Concentration In The Cable Industry.

69. Congress was aware that: "The trend towards increasing horizontal concentration in the cable industry is unparalleled in American industry. The top two MSOs serve 34% of all basic cable subscribers. Moreover, TCI, the largest MSO has interests in cable systems that reach 11.9 million subscribers, amounting to 22% of all cable subscribers." Source: "Hearings on Cable Television Regulation" at 866 (Statement of James B. Hedlund); CR VOL. I.J, EXH. 18, CR 07870.

70. Congress was informed that: "Recent estimates indicate that of all cable subscribers (more than 40 million households), 46 percent are directly or indirectly controlled by 5 companies. In 1985, the top 50 companies accounted for 70 percent of the nation's nearly 35 mililon subscribers. The two major MSOs, Tele-Communications Inc. (TCI), and American Television and Communications Corp. (ATC), now control approximately over 30 percent of all subscribers, with TCI alone controlling 22 percent. The biggest MSO is TCI which owns 600 cable systems with approximately eight million subscribers in 44 states. The second largest MSO, ATC (a subsidiary of Time, Inc.) owns 660 cable companies with 3.5 million subscribers in 32 states. TCI alone has spent nearly $3 billion acquiring over 150 cable systems in the last three years." Source: "Hearings on Competitive Issues" at 208-09 ("Does Cable Television Really Face Effective Competition?" by Janusz Ordover); CR VOL. I.C, EXH. 8, CR 01547-48.

71. The record included the following: "The largest cable operator, Tele-Communications Inc. (TCI), now accounts for almost one quarter of the market. This does not take into account its close association with the fourth largest firm (Comcast Cable Communications) through joint ownership of an entity that would be the sixth largest operator (Storer Cable Communications) if it had an independent existence (Comcast and TCI also overlap in a large basic program service, QVC Network). If this group is considered together, the dominant firm controls almost one-third of the market (a 30 percent market share). The second largest firm (Time Inc., owner of American Television Communications [ATCI] has proposed to merge with the sixth largest firm (Warner Cable Communications) and press accounts indicate that these two have jointly acquired the nineteenth largest firm (Centel Communications). This group represents over one-seventh of the cable market (a 14.5 percent market share)." Source: "Hearings on Cable Television Regulation" at 67-68 (Statement of Gene Kimmelman); CR VOL. I.H, EXH. 14, CR 05000-01.

72. The record also indicated that "overall, national concentration in the cable industry has increased signifi-

cantly since the Cable Act was passed. For example, as shown by the tables in Appendix G, TCI, the country's largest MSO, has doubled in size since 1984, and now serves nearly 12 million subscribers, or 22.16 percent of all cable subscribers. The second largest company, Time Warner, currently serves another 6 million subscribers, or 11.58 percent of all cable subscribers. Combined, these two MSOs alone serve almost 34 percent of all subscribers nationwide. The concentration of subscribers served by the top four cable companies also has increased by more than 60 percent since 1984 to 61.8 percent this year. Thus, at present, the top ten cable companies serve 32.9 million of the nation's 53 million cable subscribers." Source: FCC Report, "In the Matter of Competition, Rate Deregulations and the Commission's Policies Relating to the Provision of Cable Television Service," MM Docket No. 89-600, ¶ 73-74 at 43-44 (July 31, 1990); CR VOL. I.L, EXH. 23, CR 09017-18.

73. The record also included the following statistics on the "Current Concentration of Control of the Cable Television Industry:

TCI	22.16%
Time Warner	11.58%
Comcast Cable	8.29%
Continental Cablevision	4.83%
Cox Cable	3.03%"

Source: FCC Report, "In the Matter of Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service," MM Docket No. 89-600, Appendix G at 1 (July 31, 1990); CR VOL. I.L, EXH. 23, CR 09117.

B. Evidence Of The Trend Toward Greater Horizontal Concentration In The Future.

74. The record indicated that: "Although measuring horizontal concentration of control in the cable industry involves certain complexities and is thus subject to some

debate, the record in this proceeding demonstrates a clear trend toward increased national concentration—a trend that has accelerated since the enactment of the Cable Act." Source: FCC Report, "In the Matter of Competition, Rate Deregulations and the Commission's Policies Relating to the Provision of Cable Television Service," MM Docket No. 89-600, ¶ 71 at 42 (July 31, 1990); CR VOL. I.L, EXH. 23, CR 09014.

75. Congress was advised that: "As for horizontal integration, in 1985, about 29% of all subscribing households were served by the top five cable 'MSO's.' In 1988, that figure had grown to 35%. After the Time-Warner merger, the top five MSO's now control 42% of the nation's subscribers, and the top ten control neraly 54%." Source: "Hearings on Cable Television Regulation (Part 2)" at 108-09 (Statement of Thomas L. Goodgame); CR VOL. I.I, EXH. 16, CR 06275-76.

76. The record included the following: "Change in Concentration of Control of the Cable Industry Based on Total Subscribers

(Top 4 share)

1972:	23.9
1975:	25.2
1979:	24.9
1982:	29.3
1984:	28.7
1985:	24.9
1988:	38.4
1989:	43.4
1990:	46.9"

Source: FCC Report, "In the Matter of Competition, Rate Deregulations and the Commission's Policies Relating to the Provision of Cable Television Service," MM Docket No. 89-600, Appendix G at 3 (July 31, 1990) CR VOL. I.L, EXH. 23, CR 09119.

77. The record also included the following chart showing "Concentration of Ownership in Cable Industry." The Percent of Subscribers in various years was as follows:

Year	Top 5 MSO's	Top 10 MSO's
1985	28.9	41.7
1988	34.5	47.0
1989	42.0	53.8

Source: Cable Television Regulation (Part 2): Attachments to NAB Testimony in Hearings Before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce, 101st Cong., 2d Sess. (May 16, 1990) (Statistical Graphic) based on data from A.C. Nielsen); CR VOL. I.L, EXH. 22, CR 08964.

78. The record also indicated that: "It has been estimated that, in 1986, approximately nine billion dollars was spent on mergers and acquisitions by the largest MSOs. One industry official has commented that it would not be surprising to see as many as five to eight of the top 20 companies disappear through horizontal integration [in] the next five years." Source: "Hearings on Competitive Issues" at 209 ("Does Cable Television Really Face Effective Competition," by Janusz Ordover); CR. VOL. I.C, EXH. 8, CR 01548.

C. Evidence That Horizontal Concentration Enhances MSO's Market Power Over Cable Programmers, And That MSO's Use That Power To Extract Favorable Terms For Carriage.

79. The record included the following: "Vertical integration by major MSOs into programming services is linked with the concentration of system ownership. This is because large MSOs have assured captive subscribers which reduces the risks of substantial investment in programming." Source: "Hearings on Competitive Issues" at 211 ("Does Cable Television Really Face Effective Competition?", by Janusz A. Ordover); CR VOL. I.C, EXH. 8, CR 01550.

80. There was also evidence in the record that: "The horizontal base of cable in its largest entities is massive. TCI and ATC, the two largest cable companies, control almost 40 percent of subscribers. If someone wants to sell programming to cable, you have to get on TCI and ATC networks or you don't sell your programming. As a result, they leverage and, according to these programmers, they leverage anti-competitively to control the marketplace." Source: "Hearings on Cable Television Regulation (Part I)" at 132 (Statement of Gene Kimmelman); CR VOL. I.G, Exh. 13, CR 04330.

81. The record indicated that "the establishment of large horizontally integrated companies has provided the strength and clout to increase vertical integration and joint ventures. TCI, for example, is now a part owner of Turner Broadcasting System, a major supplier of its programming." Source: "Hearings on Cable Television Regulation (Part 2)" at 261 (Statement of Robert G. Picard); CR. VOL. I.I., EXH. 16, CR 06428.

82. The record also indicated: "Not only do these mega-MSOs have the power to destroy a program service, but they can exercise that power at little or no cost. At the present time, there is a plethora of satellite-delivered program services, but a dearth of channel capacity on most systems. As a result, most cable systems are free to replace program services at will, as there is always a substitute waiting in the wings. Indeed, things have gotten so bad that, according to *Broadcasting* magazine's November 23, 1987 issue, 'in the past 18 months, cable operator ownership and equity participation—the footsoldiers of vertical integration—have rapidly become the quid pro quo for launching new services.'" Source: "Hearings on

Competitive Issues" at 395-96 (Statement of Mark Foster); CR VOL. I.C, EXH 8, CR 01734-35.

83. The record also included the following: "TCI has not hestitated to use its inordinate power to kill a nascent program network. Satcom cites TCI's actions first in determining on an MSO-wide basis not to sign up two years ago with Turner Broadcasting Company's proposed music network (intended to compete with MTV), and second, TCI's decision last year not to sign, again on an MSO-wide basis, with NBC's proposed cable news network (intended to compete with CNN). In both instances, TCI's refusal to carry these new competitive services on any of its systems was widely cited as preventing the services from garnering sufficient subscribers to start up these highly capital intensive new program networks." Source: Motion Picture Association of America, Inc., Comments in Support of Petition for Rule Making in RM 5475 at 9-10 (April 29, 1986); CR VOL. I.S, EXH 6, CR 11850-51.

84. The record indicated that: "Four of the ten largest MSO's have been establishing ownership relationships with basic and pay programming services. TCI, which is the nation's largest MSO with more than 8 million subscribers and 16.4% of all cable subscribers, has a partial ownership interest in Turner Broadcast System (which includes WTBS, CNN, Headline News and TNT), American Movie Classic, QVC/The Fashion Channel, The Discovery Channel, Cable Value Network, Black Entertainment Network and Showtime. As one industry analyst has noted, [f]or several years it's been difficult to even think about launching a network without TCI as a participant. It can be done, but you're 20% there if you get TCI." Source: Cable Television Regulation (Part 2): Attachments to NAB Testimony in Hearings Before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce, 101st Cong., 2d Sess., Appendix

D at 1 (May 16, 1990) ("First Amendment Analysis of a Must Carry Statute" by P. Cameron Devore, et al.); CR VOL. I.L, EXH 22, CR 08822.

85. The record included the following: "As recently summarized by Hal Richardson, Senior Vice President Television, Walt Disney Television: 'The top ten MSO's control over 50% of the cable subscribers in this country. Every one of these top ten MSO's has an equity interest of at least 10% in at least one programming service.' 'In fact, there are only six major cable program services which have no MSO equity interest. All of these six services were launched prior to February 1984. There has been no major program service launches successfully in the past six years without significant MSO equity interest.'" Source: Comments of the Association of Independent Television Stations, Inc. in MM Docket No. 89-600 at 37 (March 1, 1990) (quoting Opening Statement by Hal Richardson, Senior VP Pay Television, Walt Disney Television, before the FCC Hearing, Los Angeles, California (February 12, 1990)); CR VOL. I.U, EXH 107, CR 12603.

D. Evidence That The Absence Of Local Competition Compounded The Impact Of Horizontal Concentration. In the local markets controlled by large MSO's, their gatekeeper status meant that there was no equivalent distribution alternative available to local broadcasters and cable programmers.

86. Congress was advised that: "Traditional indices of concentration, such as the Justice Department's Herfindahl-Hirschman Index, are inapplicable to cable. Since subscribers have a choice of exactly *one (1)* cable operator, the presence of other operators in the industry does *not* present real competitive alternatives for consumers. Stated another way, cable operators to whom a consumer has no access cannot act a constraint upon the broadcast

signal carriage practices of the *one* operator to which the consumer *does* have access." Source: "Hearings on Must Carry" at 64 (Statement of Preston Padden); CR VOL. I.F, EXH. 12, CR 04074.

IV. EVIDENCE THAT CABLE IS UNLIKELY TO FACE SIGNIFICANT COMPETITION IN THE NEAR FUTURE.

A. Evidence That Alternative Sources Of Multichannel Video Programming Pose No Near-Term Threat To Cable Because Of Their Uncertain Development.

87. The record indicated that: "Furthermore, alternative multichannel video programming distributors are not yet viable competitors to cable systems in most cities." Source: "Hearings on Cable Television Regulation (Part I)" at 198 (Joint Statement); CR VOL. I.G, EXH 13, CR 04396.

88. The record also indicated that: "Nor do other video programmers pose significant competitive challenges to cable. In 1989, for example, there were only 1.94 million subscribers to MDS, multichannel MDS, SMATV and backyard dishes while there were 25 times that number subscribed to cable. This actually represents a decreases from 2.72 million such subscribers in 1982." Source: Cable Television Regulation (Part 2); Attachments to NAB Testimony in Hearings Before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce, 101st Cong., 2d Sess. Appendix A at 3 (May 16, 1990) ("First Amendment Analysis of a Must Carry Statute," by P. Cameron Devore et al.); CR VOL. I.L, EXH. 22, CR 08813.

89. The record indicated that: "It seems clear that aside from direct head on competition from another wired cable system—as it exists in overbuilds—the most plausible constraint on the market power of local cable franchises should come from alternative delivery technologies

such MMDS or wireless cable, SMATV, and DBS. The available evidence suggests that these alternative cable technologies have not yet made significant inroads into the 'video marketplace.' The troublesome possibility, however, as recent developments in the cable industry strongly suggest, is that entry impediments have increased rather than decreased in the post-deregulation marketplace." Source: "Hearings on Competitive Issues" at 216 ("Does Cable Television Really Face Effective Competition?" by Janusz Ordover); CR VOL. I.C, EXH 8, CR 01555.

90. The following information was in the record: "To summarize, there currently are about 49 million cable subscribers versus 1.94 million subscribers for MDS, MMDS, SMATV and backyard dishes combined, resulting in these cable competitors having only about 3.8% of the market." Source: Comments of the National Association of Broadcasters in MM Docket No. 89-600 at 18 (March 1, 1990); CR VOL. I.T, EXH. 104, CR 12240.

91. The record indicated that: "Existing media do not provide close substitutes for today's cable service. There are a number of viewing alternatives to cable that partially compete. However, these services constitute a relatively small portion of today's cable services. For example VCR tape rentals compete with CATV but only with those portions of cable service that provide commercial free unedited movie programs." Source: GTE Comments in MM Docket No. 89-600 at 6 (March 1, 1990); CR VOL. I.S, EXH. 101, CR 12045.

92. The record indicated that: "An empirical study commissioned by the National Cable Television Association found that "cable's significantly low installation costs and greater channel capacity give it an overwhelming advantage over the likely alternative delivery systems." Source: "Hearings on Competitive Problems" at 356 (Statement of Preston Padden) (citing Cable & Competing Technologies: A Conjoint Model of Consumer Choice,

Executive Summary 1 (Opinion Research Corp., 1984)); CR VOL. I.H, EXH. 14, CR 05289.

93. The following information was in the record: "In 1982, when subscription television (STV) and multipoint distribution service (MDS) were at their high point and satellite master antenna television (SMATV) firms were just starting, alternative multichannel technologies to cable (MDS, multichannel MDS (MMDS), SMATV, and backyard dishes) had approximately 2.64 million subscribers, or 8.9% of the multichannel video market, as compared to cables' 27.2 million subscribers. By the end of 1989, however, there were only 1.94 million subscribers to these alternative technologies, or 3.8% of the market, as compared to cable's 47 million subscribers. According to a Malarkey-Taylor Research economist, in order for wireless cable to succeed in head-to-head competition against a cable operator, 'almost everything has to go right . . . There has to be high density, high penetration, low capital costs and it helps if the incumbent has poor service at high rates.' When everything does not go right, the result is that recently experienced by Microband Company, one of wireless cable's principal companies serving New York, Detroit and Washington, which filed for bankruptcy last December. The primary reason for Microband's financial difficulties reportedly was its difficulties in securing programming from cable program suppliers." Source: Comments of the National Association of Broadcasters in MM Docket No. 89-600 at 14-15 (March 1, 1990); CR VOL. I.T, EXH. 104, CR 12236-37.

B. DIRECT BROADCAST SATELLITE SERVICE'S HISTORICAL FAILURE AND UNCERTAIN PROSPECTS.

1. *Evidence Of Failed Efforts To Establish DBS Services In The Past.*

94. The record indicated that: "NCTA and other cable interests place great reliance on the recent announcement of two new DBS ventures as providing competition for local cable systems. The Commission should view these claims with considerable skepticism. Plans for DBS entry have been put forward for ten years, and the only actual entrant, USCI, remained in operation for only a few months. *Broadcasting* recently reported a remark by Hughes Communications' vice president for video services: 'The 'window' on DBS interest 'goes up and down with some regularity,' Raimo said. It's up when major communications companies begin expressing interest in the media, he said. It's down when they find out that 'it costs a hell of a lot to get it going (*Broadcasting*, Feb. 19, 1990 at 65.)." Source: Comments of NAB in MM Docket No. 90-4 at 24-25 (April 6, 1990); CR VOL. I.N, EXH. 38, CR 09919-20.

95. The record indicated: "As observed in the Notice, the Commission adopted regulations creating the DBS service in 1982. To date, however, there still is no provider of DBS service. Moreover, the trail of dead bodies which DBS has included in its wake, such as Comsat, USCI, and Rupert Murdoch's Skyband, make the prognosis for DBS providing effective competition for cable 'iffy' at best." Source: Comments of the National Association of Broadcasters in MM Docket No. 89-600 at 15-16 (March 1, 1990); CR VOL. I.T, EXH. 104, CR 12237-38.

96. As the Senate Committee report reflects, Congress was aware of the following: "In addition to satellite operating in the C and Ku-bands, the FCC has also set aside frequencies for a Direct Broadcast Satellite (DBS) service. Unlike the larger satellite dishes needed for C and Ku-band reception, the DBS signal is higher powered and could be received by one foot dishes. While the FCC authorized this service in the early 1980s and licensed a number of providers, to date there has been no DBS service launched." Source: "1991 Senate Report" at 15, CR VOL. I.A, EXH. 3, CR 00275.

2. *Evidence That Cable's Existing Penetration Rate Provides A Tremendous Competitive Advantage Over DBS.*

97. Congress was aware of the following: "Questions remain[] . . . about the true viability of home dishes as small as those proposed by Sky Cable and K Prime, about the notorious Ku rain fade and about the purported ease of pointing a consumer dish in a crowded city or forested area. And of the potential market, said Roy Bliss, executive vice president of United Video, the 20 million [subscriber] number is 'crazy. There are only seven million homes left after homes passed by cable, and that is about half saturated. Certainly, the cream has been skimmed.' " Source: "1991 Senate Report" at 16, n.42 (quoting *Broadcasting*, June 18, 1990, p. 55); CR VOL. I.A, EXH. 3, CR 00276.

98. Similarly: " 'Multichannel News—Turner is not too bullish on the prospects for direct broadcasting satellite service. On the recent DBS announcements, Turner said cable currently enjoys a distinct advantage over DBS, and labeled DBS efforts 'too little too late' in terms of attempting to siphon viewers from cable. 'If it had started with cable it might have gotten a portion of the cable business,' he said. If and when DBS projects get off the ground Turner said, '70 percent of the country will already have cable. With cable, you only have one wire and no antennas,' he said. '[W]ith DBS, you have outside antennas, a descrambler . . . and you need a live-in engineer.' " Source: "1991 Senate Report" at 16 (quoting Multichannel News, May 7, 1990, p. 19); CR VOL. I.A., EXH. 3, CR 00276.

3. *Evidence That Cable Would Exercise Significant Control Over DBS And That Direct Competition Between DBS And Cable Would Be Limited.*

99. The record indicated that: "In any event, recent statements by principals of proposed DBS services K-Prime and Sky Channel indicate that even if and when DBS arrives, it will not be a head-to-head competitor to franchised cable television operators. Indeed, franchised cable MSOs hold ownership interests in both companies and have stated their intention to use the existing local cable operators as their service agents. *Multichannel News*, Feb. 26, 1990, at 1, 47. If so, then DBS must be viewed as an enhancement, not a competitor, to franchised cable." Source: Reply Comments of the National Satellite Programming Network, Inc., et al. in MM Docket 89-600 at 35-36 (April 2, 1990); CR VOL. I.GG, EXH. 207, CR 18264-65.

100. The record also indicated that: "Moreover, it is not clear at this moment whether the DBS systems will be deployed as a rival or as a complement to current cable systems. The Commission will need more information about these two joint ventures before it can determine whether either or both is likely within a reasonable time to constrain any exercise of local market power by current cable services." Source: Reply Comments of the US Dept. of Justice in MM Docket 89-600 at 35-36 (April 2, 1990); CR VOL. I.GG, EXH. 206, CR 18205.

101. The record indicated that: "That either of the two newly announced DBS ventures will provide a competitive alternative to local cable systems is even more dubious. Both of these ventures—K Prime Partners and Sky Cable—are at least partially owned by cable system operators. K Prime is owned by nine cable MSOs, lead by TCI, in a partnership with GE Americom. One of the four equal Sky Cable partners is Cablevision Systems, a major MSO and cable programmer. Their ownership

structure alone makes it unlikely that either venture will seek to compete with cable systems. Their statements confirm this. K Prime, which reportedly will carry distant broadcast signals and a few pay-per-view channels, is supposedly designed to appeal equally to cable and non-cable households. At the press conference announcing Sky Cable, its principals are reported to have stated that the service 'would supplement rather than compete with cable.' *Broadcasting*, February 28, 1990 at 28. Sky Cable also plans to market its service through local cable operators. *Broadcasting*, March 12, 1990 at 30. There is nothing about either proposed DBS venture which could give the Commission any impression that they will serve as a competitive force to local cable systems." Source: Comments of NAB in MM Docket No. 90-4 at 25-26 (April 6, 1990); CR VOL. I.N, EXH. 38, CR 09920-21.

102. The record indicated that: "Finally, and perhaps most troublesome, is the fact that one of the first DBS services that may be available, K Prime Partners, is one in which most of the largest cable system operators, namely TCI/United Artists, ATC/Warner, Comcast, Continental Cablevision, Cox Cable, Newhouse Broadcasting and Viacom cable, will be the 85% owners. Similarly, another proposed DBS provider, Tempo Satellite Inc., is a subsidiary of TC. One can hardly expect these entities to provide effective competition for themselves." Source: Comments of the National Association of Broadcasters in MM Docket No. 89-600 at 15-16 (March 1, 1990); CR VOL. I.T, EXH. 104, CR 12237-38.

4. *Further Evidence That DBS Would Not Be A Significant Competitive Threat To Cable In The Reasonable Future.*

103. The record indicated that: "A good deal of uncertainly exists, as one would expect in any area of rapidly advancing technology and unclear markets. It

would come as little surprise if new partnerships emerge, old ones collapse, and advertised future dates for service slip by months or years." Source: (Discussing DBS). "Hearings on Cable Television Regulation" at 358 ("Direct Broadcast Satellites," by Leland L. Johnson and Deborah R. Castleman); CR VOL. I.J, EXH. 18, CR 07363.

104. The following information was in the record: "An oft-discussed competitor for cable is DBS, direct broadcast satellite. Although two consortia recently announced ambitious plans to begin DBS service and several others have obtained licenses to do so, it remains doubtful whether this technology can provide immediate or near-future competition to cable. Any significant presence from DBS is, at best, years off and subject to all the uncertainties of any space venture. The Sky Cable proposal in particular is based on yet undeveleped technology to expand the number of channels it can offer via satellite. More importantly, both of these new ventures include as owners cable MSO's and programmers, a fact already noted by members of this local cable systems, and plans to market its service through local cable outlets, which certainly dooms multi-channel competition with cable. Given the failure of past DBS proposals, we see no reason for policy makers to assume that it will provide real competition to cable any time in the near future." Source: "Hearings on Cable Television Regulation (Part 2)" at 116 (Statement of Thomas L. Goodgame); CR VOL. I.I, EXH. 16, CR 06283.

105. The record indicated that: "Indeed, a recent press report suggests that the proposed service by Sky Channel is unrealistic given the present state of technology. 'Feasibility of Sky Cable's Business Plan Questioned.' *Satellite Week*, March 26, 1990, at 2. It quotes Comsat Vice President and Chief Scientist Joseph Campanella as questioning both Sky Channel's ability to transmit its proposed multichannel system within the

bandwidth set aside and to provide sufficient electrical power to the system. TCI's head of research and development Tom Elliot is also quoted in the article as doubting Sky Channel's current ability to construct a system that will survive 'tremor strain on units during launch,' to develop adequate cooling and heating systems or to build high power, lightweight batteries. *Id.* Clearly, DBS may still be years away from deployment." Source: Reply Comments of the National Satellite Programming Network, Inc., et al. in MM Docket 89-600 at 35 (April 2, 1990); CR VOL. I.GG, EXH. 207, CR 18264.

106. The record indicated that: "Comsat Labs' Chief Scientists doubts that the number of channels planned by Sky Cable can be achieved within the bandwidth it is allotted and at the cost its partners contemplate, and points out that even the best existing compression technique provides unacceptable picture quality. *Communications Daily*, March 21, 1990 at 2. It is also worth noting that the British DBS venture, Sky Television, owned by Rupert Murdoch who is one of the Sky Cable partners, has lost over $340 million to date, in addition to losses of perhaps $60 million on its predecessor service, Sky Television. *Broadcasting*, February 26, 1990 at 55." Source: Comments of NAB in MM Docket No. 90-4 at 27 (April 6, 1990); CR VOL. I.N, EXH. 38, CR 09922.

107. The record indicated that: "Moreover, the Commission should not rely on the partners' predictions as to when and whether their services will actually be in operation. Any DBS venture is subject to significant uncertainties concerning the availability and reliability of launch vehicles which may delay and increase the cost of any space project. The Sky Cable project is especially uncertain. Sky Cable plans a system which would carry 108 channels, but admits that it has little idea as to what programming could fill those channels. The satellites, the compression scheme, and the receiving equipment contemplated by Sky Cable are all equipment and technology which does not exist today. One analyst is reported to have concluded that: 'Sky Cable's prospects are based on uncertain technologies—dishes that do not exist that would receive programming that might not be available sent by satellites that are still on the ground waiting to be tested.'" Source: Comments of NAB in MM Docket No. 90-4 at 26-27 (April 6, 1990); CR VOL. I.N, EXH. 38, CR 09921-22.

108. The record indicated that: "While direct broadcast satellite (DBS) service may eventually offer a more cost effective satellite-based delivery alternative to cable service, it is currently unavailable and much too speculative to be counted on as a viable competitive substitute to existing cable service in the near future. Moreover, DBS ventures are largely owned by existing cable TV operators." Source: Comments of BellSouth Corp., et al., in MM Docket 89-600 at 7 (March 1, 1990); CR VOL. I.W, EXH. 114, CR 13656.

109. Congress was aware of these impediments, and the fact that DBS would not be a carriage option for local broadcast stations: " 'Department of Justice—At the present time considerable uncertainty surrounds both of the recently announced DBS joint ventures. The lack of commercial success of previously efforts to utilize DBS technology precludes one from assuming that either or both of the joint ventures will produce a cost-effective technology that will in fact effectively rival the current cable distribution systems. Even if either or both of these systems are successful from a cost/technology perspective, they will not carry local television stations and initially at least will have smaller channel capacities than most cable systems. Moreover, it is not clear at this moment whether the DBS systems will be deployed as a rival or as a complement to current cable systems." Source: "1991 Senate Report" at 16-17 (quoting April 2, 1990 Comments of DOJ in MM Docket No. 89-600, pp. 35-36); CR VOL. I.A, EXH. 3, CR 00276-77.

C. EVIDENCE THAT WIRELESS CABLE SYSTEMS HAD FAILED TO EMERGE AS SIGNIFICANT COMPETITIVE ALTERNATIVES, AND WERE NOT LIKELY TO DO SO IN THE FUTURE.

1. *The Historical Limitations of Wireless Cable Systems.*

110. It was reported in the record that: "The most recent data clearly shows the lack of MMDS success. Fourteen existing systems had an average penetration rate of only two percent of their market potential. This value actually overstates the success of most of these systems since the national average includes several rural systems with high penetration but low market potential (*e.g.*, 500 in Deming, New Mexico). Even an optimistic projection of MMDS growth shows its national average share of the total market as only 3.1 percent by 1998, and its subscriber total as only 3.2 percent of the number of projected cable customers. Clearly, the Commission cannot rely on MMDS entry as a significant competitive restraint on cable systems." Source: Comments of NAB in MM Docket No. 90-4 at 22-23 (April 6, 1990); CR VOL. I.N, EXH. 38, CR 09917-18.

111. The record indicated that: "Several years ago, the FCC created the distribution service called multichannel multipoint distribution service (MMDS), better known as wireless cable. MMDS systems provide cable programming through microwave technology. Since that time, wireless cable has been plagued by technical limitations and regulatory barriers which have precluded its ability to make serious inroads into cable's territory. For example, according to an industry estimate, wireless cable today serves fewer than 350,000 residential subscribers nationwide, as compared to cable's nearly 50 million subscribers." Source: Comments of the United States Telephone Association in MM Docket No. 89-600, Appendix 5 at 7

(March 1, 1990) (Statement of Paul MacAvoy); CR. VOL. I.V, EXH. 112, CR 13443.

112. The record also demonstrated that: "Today, MMDS reaches only 0.4% of cable subscribers." Source: "Hearings on Cable Television Regulation" at 864 n.8 (Statement of James B. Hedlund); CR VOL. I.J, EXH. 18, CR 07868.

113. The following information was in the record: "Notwithstanding HBO's efforts to support MDS, 14 MDS affiliates have declared bankruptcy or gone into receivership. We have been forced to write off more than $6 million in receivables from MDS affiliates, a rate of delinquency unheard of among our cable affiliates. By the middle of 1986, HBO had only 24 MDS affiliates in 16 cities serving 146,000 subscribers—a decline in subscribership of over 61 percent in less than four years. Theft of MDS services continues to be an enormous problem for HBO. HBO is distributed in an unscrambled form by MDS operators in seven large metropolitan areas. We believe that over one million households per month are now illegally intercepting unscrambled MDS transmission. Recently, HBO has been approached by a small number of multi-channel MDS (MMDS) operators seeking to distribute our services. MMDS is a relatively new and unproven technology. Given the history of MDS, HBO believes it is prudent to proceed in a careful manner with MMDS." Source: "Hearings on Competitive Problems" at 154-155 (Statement of Gerald M. Levin); CR VOL. I.H, EXH. 14, CR 05087-88.

114. Congress was also aware that "just last year, the top MMDS operator in the country, Microband, filed for bankruptcy." *Source*: "1991 Senate Report" at 15; CR VOL. I.A, EXH. 3, CR 00275.

2. *Other Impediments To Wireless Cable.*

115. The following was in the record: "We have some legitimate concerns with the ability of MMDS operators

to distribute a signal that is technically secure. We have recently experienced significant problems with a scrambling system for our HBO satellite feed. Only four years ago we believed that a scrambling system was secure. Now it has a theft rate approaching 50 percent. We are also concerned with the financial security of MMDS operators because of our negative experience with undercapitalized MDS operators who often lacked the strength to effectively market and distribute our services. When a distributor provides poor or inefficient service, that ultimately reflects badly on HBO with the consumer." Source: "Hearings on Competitive Problems" at 156 (Statement of Gerald M. Levin); CR VOL I.H, EXH. 14, CR 05089.

116. The record indicated that: "The various forms of 'wireless cable' also lack the channel capacity of cable television systems. They also are even more dependent that broadcast television on unobstructed pathways from transmitter to customer antenna, thereby limiting their greatest usefulness to areas where terrain essentially is flat and man-made obstructions are few and low to the ground. At present they serve so few consumers as to provide no meaningful competition to cable television." Source: Comments of INTV in MM Docket No. 90-4, "In the Matter of Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates" at 15 (April 6, 1990); CR VOL. I.N, EXH. 37, CR 09836.

117. The following information was in the record: "*MMDS* Any expectations which the Commission may have had about the rapid development of MMDS as a competing video distribution system were certainly undermined by the bankruptcy of Microband Corporation, the Nation's largest MMDS operator. *Electronic Media,* January 15, 1990 at 170. Its inability to secure adequate programming was reportedly one of the primary sources of its financial difficulties. *Id.* An industry analyst has pointed out that for MMDS to compete with cable, 'al-

most everything has to go right . . . There has to be high density, high penetration, low capital costs and it helps if the incumbent has poor service at high rates.'" Source: Comments of NAB in MM Docket No. 90-4 at 22 (April 6, 1990); CR VOL. I.N, EXH. 38, CR 09917.

118. Congress was also aware of the following: "'MMDS, for example, is likely to be a poor substitute for a cable system when there are physical construction (*e.g.*, hills and tall buildings) that would block the former's signal. Entry by MMDS might also be affected by regulatory factors. Moreover, because MMDS has a relatively low channel capacity, its attractiveness to consumers as a substitute for cable will depend on the quality (*i.e.*, number and type of channels) offered by the incumbent channel system." Source: "1991 Senate Report" at 15 (quoting Comment of the Staff of the Bureau of Economics and the San Francisco Regional Office of the FTC in FCC MM Docket No. 89-600, p. 13); CR VOL. I.A, EXH. 3, CR 00275.

D. Evidence That Telephone Companies Were Also Unlikely To Compete Significantly With Cable In The Delivery Of Television Programming.

119. The record indicated: "Direct competition from cable systems owned and operated by fiber-optics-using telephone companies has yet to materialize. Its future is mired in complex legal and regulatory battles." Source: "Hearings on Competitive Issues" at 216 n.30 ("Does Cable Television Really Face Effective Competition?" by Janusz Ordover); CR VOL. I.C, EXH. 8, CR 01555.

120. The following information was in the record: "Cable right now is available to 93 percent of America's television households. At best, for even entry by the telephone companies, we are looking at 15 to 20 years before a national fiber network could be established to provide a second broadband wire into American homes,

if in fact a second wire will ever reach the home." Source: "Hearings on Cable Television Regulation" at 777 (Statement of Edward O. Fritts); CR VOL. I.J, EXH. 18, CR 07781.

121. The record included the following: "[T]he most optimistic estimates for the installation of broadband fiber by telephone companies places fiber in only 18% of U.S. households by the year 2000." Source: "Hearings on Cable Television Regulation" at 865 n.8 (Statement of James B. Hedlund) (citing Pepper, *Through the Looking Glass: Integrated Broadband Networks, Regulatory Policies and Institutional Change* (November 1988), at 101)); CR VOL. I.J, EXH. 18, CR 07869.

122. The record also indicated: "Some day telephone companies may provide video service to the home in competition with cable, but that day still is far away. Many technological and policy hurdles must be crossed before video service via telephone systems is practicable." Source: "Hearings on Competitive Issues" at 526 (Statement of Gary Chapman); CR VOL. I.C, EXH. 8, CR 01865.

123. The following was included in the record: "Under any scenario substantial telephone company participation in the video marketplace is unlikely to occur in the near term and, consequently, does not play a role in our analysis." Source: FCC Report, "In the Matter of Competition, Rate Deregulations and the Commission's Policies Relating to the Provision of Cable Television Service," MM Docket No. 89-600, ¶ 108 at 58 (July 31, 1990); CR VOL. I.L, EXH. 23, CR 09030.

V. EVIDENCE THAT CABLE OPERATORS HAD SIGNIFICANT AND GROWING INCENTIVES TO REFUSE CABLE CARRIAGE, OR OTHERWISE ACT ADVERSELY, TO BROADCASTERS.

A. Direct Competition For Auditing Revenue.

1. *Evidence Of Rapidly Growing Competition Between Cable Operators And Local Broadcasters For Advertising Revenue.*

124. The record indicated that: "Cable increasingly is competing with television for advertising dollars. Although cable is a subscription service, many basic cable programming services also are supported by advertising. As with network television programming, some of the advertising spots on these cable services are sold by the services, while they make other spots available for sale by the local systems that carry their programming. Cable's attractiveness to advertisers is growing. Total cable advertising, national and local, was only $58 million in 1980. In 1989, it is estimated that local cable advertising will be more than $1.96 billion. Both national and local advertising is growing on cable at a substantial rate. *It is estimated that local cable advertising in 1989 will total $488 million, a 398% increase over 1984, and a 150% increase over 1986.*" Source: "Hearings on Must Carry" at 43-44 (Statement of Edward O. Fritts) (emphasis added); CR VOL. I.F, EXH. 12, CR 04053-54.

125. The record included the following: "NCTA boasts that local cable ad revenues alone *quintupled* between 1984 and 1989, from $98 million to $488 million, and that by 1995, local cable ad revenues are expected to triple again to $1.464 billion." Source: "Hearings on Cable Television Regulation (Part 2)" at 104 n.6 (Thomas L. Goodgame) (citing NCTA Comments in MM Docket No. 89-600 at 44.); CR VOL. I.I, EXH. 16, CR 06271.

126. The record included the following information:

> "There is increasingly strong incentive for cable to drop local broadcast signals. Cable operators are now aggressively competing with broadcasters for the advertising dollars that support free programming available to the public on TV stations. Carriage is no longer an issue of having sufficient channel capacity. The incentive not to carry local stations is purely economic; it is the ability to deny carriage to local stations and preclude access to their local audience in order to obtain a competitive advantage. According to authoritative sources, cable advertising revenues in 1987 were over a *billion dollars*—and cable advertising is a relatively new phenomenon with great future growth. One study projects cable advertising revenue growth at a compound annual rate of 18.5%. Specifically, the competition for local advertising dollars is growing and will become more intense in the future. National spot sales on cable television have increased from 3 million in 1983 to 12.5 million in 1988. Cable has increased its local spot from 47 million in 1983 to 338.5 million in 1988, an *increase of over 720 percent*. The growth in local advertising revenues prompted at least one cable executive to exclaim:
>
> 'But the big story in the last year is that we are breaking through to the major local advertisers. We're starting to get our message across to the ad agencies handling these accounts. We're going after the serious bucks.' "

Source: "Hearings on Cable Television" at 315-16 (Statement of James B. Quello); CR VOL. I.D, EXH. 9, CR 02401-02.

127. The record included the following facts: "Cable advertising revenues have increased from $58 million in 1980 to over $1.3 *billion* in 1988. Spot sales by cable operators have risen 3000% since 1980. . . [T]he capability of contiguous and proximate cable systems to interconnect and sell advertising jointly also is expected to produce growth in local, as well as national, cable advertising sales." Source: Comments of the Association of Independent Television Stations, Inc. in MM Docket No. 89-600 at 99 (March 1, 1990); CR VOL. I.U, EXH. 107, CR 12665.

128. The record included the following chart from Paul Kagan Associates, showing the dollar amount of "National/local spot" advertising for cable operators (in millions), and the percentage of all cable advertising that this involved:

	1981	$17	13.9%
	1982	$32	14.1%
	1983	$50	13.1%
	1984	$86	15.0%
	1985	$139	18.5%
	1986	$192	20.6%
	1987	$264	23.0%
	1988	$351	24.9%
(est)	1990	$571	28.8%
(est)	1995	$1,358	33.6%

Source: "Hearings on Competitive Problems" at 320 (Statement of Edward O. Fritts) (citing Paul Kagan & Associates, *Cable TV Facts 88*, 1988 at 53; CR VOL. I.H, EXH. 14, CR 05253.

2. *Evidence That This Trend Would Continue In The Future.*

129. The record indicated that: "Cable advertising generally is the fastest-growing segment of the video advertising market, with a potential for substantial growth whether or not there are further increases in penetration or cable viewing. *As growth in cable penetration peaks and levels off, efforts of cable operators to exploit advertising opportunities will increase. The incentive of cable operators to pursue advertising opportunities will intensify even further if growth in subscription revenues is cur-*

tailed by regulation of cable subscription rates. And local advertising is the category in which observers anticipate the greatest growth." Source: Comments of Chris-Craft Industries, Inc. in MM Docket No. 90-4 at 6 & n.8, 9 (Sept. 25, 1991) (citing FCC Office of Policy Planning Working Paper, *Broadcast Television in a Multichannel Marketplace*, 6 FCC Rcd at 4082) (emphasis added); CR VOL. I.Q, EXH, 74, CR 11235.

130. It was reported in the record that: "The OPP staff study confirms the growing significance of advertising revenue to cable systems, pointing to estimates projecting that advertising revenue to cable operators will increase from $635 million in 1990 to $1.5 billion in 1995 and $2.4 billion in 1999." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 41-42 (Sept. 25, 1991); CR VOL. I.K, EXH. 21, CR 08362-63.

131. The record also indicated that: "Advertising has been described as the 'next frontier' in cable revenue growth by Ajit Dalvi, Senior Vice-president of Marketing and Programming for Cox Cable Communications. [Citing Channels, 'Field Guide 1990' at 90.] Stated Mr. Ajit, 'Greater sophistication in ad sales should be a critical priority for systems.'" Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 42 (Sept. 25, 1991); CR VOL. I.K, EXH. 21, CR 08363.

132. The record indicated that: "In the same issue of MULTICHANNEL NEWS, Ted Turner, chairman of TBS, rejoiced in his projections that showed 'cable siphoning off one-third of the $6 billion local TV advertising revenues, and one-third of the broadcast networks' annual $9 billion of take.'" Source: "Hearings on Cable Television" at 363 (Testimony of Jack Valenti) (citing *Cablevision*, April 25, 1988, at 60.); CR VOL. I.D, EXH. 9, CR 02449.

133. The record indicated: "According to a recent Commerce Department report, cable's predicted 10% increase in revenues for 1990 'will be fueled largely by a rapid increase in cable TV advertising sales.'" *Cable TV Consumer Protection Act of 1989: Hearings on S. 1880 Before the Subcommittee on Communications of the Committee on Commerce, Science, and Transportation*, 101st Cong., 2d Sess. at 170 n.4 (March 29 and April 4, 1990) (hereafter "Hearings on Cable TV Consumer Protection Act of 1989") (Statement of Edward O. Fritts) (quoting *Multichannel News*, January 1, 1990 at 1); CR VOL. I.H, EXH. 15, CR 05744.[1]

134. The record also demonstrated that: "Local ad sales operations now encompass more than 55% of all cable subs. *Ad sales are the cable industry's hottest and brightest area of growth.*" Source: Paul Kagan & Associates, *Cable TV Advertising*, in MM Docket No. 85-349 at 1 (Feb. 28, 1986) (emphasis added); CR VOL. I.GG, EXH. 209, CR 18280.

135. It was reported in the record that: "Paul Kagan Associates estimates that cable system spot sales will grow at an average annual compound rate of 22.7% over the next eight years and will be $1.4 billion by 1995. Kagan projects that national cable network sales will grow at an average annual compound rate of 14.9% over the next eight years reaching nearly $2.7 billion by 1995. Kagan also projects that local cable system spot sales (national plus local spot) are expected to increase from 23% of total cable ad dollars in 1987 by 33.6% by 1995." Source: Cable Television Regulation (Part 2): Attachments to NAB Testimony in Hearings Before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce, 101st Cong., 2d Sess., Appendix E at 1 (May 16, 1990) ("First Amendment Analysis of a Must Carry Statute," by P.

[1] This includes advertising revenues obtained by cable programming networks.

Cameron Devore et al.); CR VOL. I.L, EXH. 22, CR 08824.

136. The record included the following facts: "It is also clear by comparing the growth of cable's local versus national advertising revenues how important the former is becoming to the industry. While national spot sales on cable television increased from $3 million in 1983 to $12.4 million in 1988, local spot sales increased from $47 million to $338.5 million in that same period, an increase of over 720%. The objective of the cable industry in pursuing local ad dollars was succinctly put by one cable industry official: 'But the big story in the last year is that we are breaking through to the major local advertisers. We're starting to get our message across to the ad agencies handling these accounts. We're going after the serious bucks.'" Source: Cable Television Regulation (Part 2): Attachments to NAB Testimony in Hearings Before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce, 101st Cong., 2d Sess., Appendix E at 1-2 (May 16, 1990) ("First Amendment Analysis of a Must Carry Statute," by P. Cameron Devore et al.) (citing *Channels*, May 1988 at 72, quoting, Ron Fischmann, Vice President, Cable Advertising Bureau); CR VOL. I.L, EXH. 22, CR 08824-25.

137. The record included the following: "The above discussion points to one logical conclusion, cable advertising (both national/local spot and network) is becoming an increasingly meaningful portion of the average cable operator's business. The fact that *the incremental revenue obtained from local cable advertising represents a high margin revenue stream (due to the fact that a cable system's programming costs and other non-advertising sales expenses are already covered by monthly subscriber charges)*, makes it all the more obvious that local cable systems, looking for major new growth areas, are destined to become significant players in the local television advertising marketplace." Source: "Hearings

on Competitive Problems" at 321-22 (Statement of Edward O. Fritts) (emphasis added); CR VOL. I.H, EXH. 14, CR 05254-55.

138. It was reported in the record that: "The [FCC's Office of Policy Planning] staff also observed that ultimately: 'Broadcast television stations will experience declining revenues and increasing program costs. Network compensation will fall with network advertising revenues, and national spot advertising will erode partially to cable. The potential for greatly increased competition from cable in local advertising is clear as well.'" Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 42 n. 76 (Sept. 25, 1991) (quoting OPP Report); CR VOL. I.K, EXH. 21, CR 08363.

139. The following information was in the record: ". . . cable system spot sales (national/local spot) are the most rapidly growing portion of total cable advertising revenues (spot sales plus cable network sales). According to cable industry expert Paul Kagan, system spot sales grew at an average annual compound rate of 37.8 percent from 1985 to 1987. Kagan also estimates that system spot sales will grow at an average annual compound rate of 22.7 percent over the next eight years and will be close to $1.4 billion dollars by 1995." Source: "Hearings on Competitive Problems" at 319-21 (Statement of Edward O. Fritts); CR VOL. I.H, EXH. 14, CR 05252-54.

140. Congress was also advised that: "As I noted, cable is now increasingly aggressive in seeking advertising revenue. Total cable advertising revenues for 1989 were estimated to be about $2 billion, up from $58 million in 1980. The cable industry predicts that national and local cable ad revenues will reach $4 billion by 1994 and $6.7 billion by 1998. For local advertising, cable systems in many areas have developed the ability to interconnect so that advertising can be sold across several systems, allow-

ing coverage roughly comparable to that of local broadcasters." Source: "Hearings on Cable TV Consumer Protection Act of 1989" at 170-71 (Statement of Edward O. Fritts); CR VOL. I.H, EXH. 15, CR 05744-45.

141. The following facts were in the record: "As the revenue per pub from ad sales grows, interest and attention from cable system managers and MSOs increases—especially at a time when the soon-to-be deregulated cable industry is looking to raise basic rates. *Ad sales are an incremental source of revenue that do not directly affect subscribers' pocketbooks and do not threaten basic or pay penetration as a rate increase can.*" Source: Paul Kagan & Associates, *Cable TV Advertising*, in MM Docket No. 85-349 at 1 (Feb. 28, 1986); CR VOL. I.GG, EXH. 209, CR 18280.

142. Congress was also aware of the following information (as set forth in a Committee report): "The Committee believes that the incentive to engage in such anti-competitive activity will continue. Cable operators will continue to compete with local broadcasters for local advertising revenues. Cable's local advertising revenues climbed from just $167 million in 1985 to an estimated $760 million in 1991 and are expected to reach $906 million [in] 1992." Source: "1992 House Report" at 56 (citing *Cablevision*, April 6, 1992, at 35-36); CR VOL. I.A, EXH. 4, CR 00435.

3. *Evidence That The Emergence Of "Interconnects" Would Further Accelerate Advertising Competition Between Cable Operators And Local Broadcasters.*

143. The record indicated that: "Technology, in the form of greatly improved automated commercial insertion equipment, coupled with local area cable system interconnects (which make it much more cost effective to well cable advertising across a large number of local cable systems), and with increasing audience shares for national cable network programming has made prospective advertisers sit up and take notice (see Table 2, *infra*)." Source: "Hearings on Competitive Problems" at 321 (Statement of Edward O. Fritts); CR VOL. I.H, EXH. 14, CR 05254.

144. It was also explained in the record that: "the rapid growth of interconnects, which accounted for $32 million in gross billings in 1984, $49 mil. in 1985 and are expected to hit $71 mil. in 1986 . . . ." Source: Paul Kagan & Associates, *Cable TV Advertising*, in MM Docket No. 85-349 at 1 (Feb. 28, 1986); CR VOL. I.GG, EXH. 209, CR 18280.

145. The following fact was in the record: "Nationally, there are 86 cable interconnects serving 20.4 million cable subscribers." Source: "Hearings on Competitive Problems" at 321 n.12 (Statement of Edward O. Fritts) (citing *Cable TV Facts 88*, (New York, NY: Cable Television Advertising Bureau), 1988, at 35-7); CR VOL. I.H, EXH. 14, CR 05254.

146. More recent data in the record indicated that: "In 94 areas, cable systems have formed 'interconnects.' This enables proximate systems to sell advertising on all the interconnected ssytems. Even over a year ago, interconnects reached about 50% of all cable households and account for about one-third of cable's local spot advertising sales." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 43 (Sept. 25, 1991) (citing 'The Well-connected Medium-Interconnects Are Stepping Out of Broadcast Boundaries,' Cable World, January 1, 1990, at 18.) CR VOL. I.K, EXH. 21, CR 08364.

147. The record included the following information: "For local advertising, cable systems in many areas have developed the ability to interconnect so that advertising can be sold across several systems, allowing coverage roughly comparable to that of local broadcasters." Source: "Hearings on Cable TV Consumer Protection

Act of 1989" at 170-71 (Statement of Edward O. Fritts); CR VOL. I.H, EXH. 15, CR 05744-45.

148. The record also indicated: "The limited reach of individual cable systems within a broadcast market is increasingly being overcome by cable 'interconnects,' whereby cable companies in a given market enhance their advertising capacity by banding together to sell advertising in concert on the cable channels that they jointly carry." Source: Comments of Chris-Craft Industries, Inc. in MM Docket No. 90-4 at 7 n.10 (Sept. 25, 1991); CR VOL. I.Q, EXH. 74, CR 11236.

149. The record included the following information:

> "Cable systems increasingly sell advertising in the same way broadcasters do across entire television markets. In some markets, one MSO operates virtually all of the area cable systems and can easily sell block insertions across all of its systems. In markets where cable ownership is more diverse, the cable industry is rapidly developing interconnects which offer similar benefits to advertisers. In 1990, there were 101 cable interconnects in operation. The largest, the New York Interconnect, offers advertisers access to 3.1 million subscribers, 82 percent of all cable households in the New York ADI. The Cable Advertising Bureau promotes buys through interconnects since they 'offer the efficiency of developing a multi-system buy, often an entire market, in which only one contract need be negotiated.' "

Source: Memorandum from S. Jacobs & J. Goodmaan to Repr. Eckart at 4-5 (June 10, 1992); CR VOL. I.N, EXH. 30, CR 09713-14.

4. ***Evidence That The Increasing Purchase And Control By MSOs Of Geographically Concentrated "Clusters" Of Cable Systems Would Also Magnify Both The Competition For Local Advertising Revenues And The Adverse Impact On Broadcasters Denied Carriage By These Cable Systems.***

150. The record included the following information: "Thus it has become quite evident that the very largest MSO's, including TCI and ATC, have already gained such inordinate market power that they are able to control what programming will be available not only on their own systems, but also to the rest of the cable industry. This inordinant control over available programming services evidences itself on the regional level as well, where a high degree of clustering of systems ownership will allow a single MSO to dictate which regional networks will survive and which will fail. Indeed, in today's environment with no 'must carry' television signal carriage requirements (in the wake of the *Quincy Cable decision*), an MSO that controls cable systems covering a large portion of the viewing area of a local television station can use its market power either to exclude from all its system the local station, thereby greatly threatening its viability, or to require exorbitant carriage fees. In such markets, the local station cannot strike a 'better' bargain with 'competing' cable systems, since there are none; it must meet the MSO's demands, or fail." Source: Motion Picture Association of America, Inc., Comments in Support of Petition for Rule Making in RM 5475 at 10-11 April 29, 1986); CR VOL. I.S, EXH. 96, CR 11851-52.

151. The record indicated: "On the local/regional level, the concentration levels which will result from the Group W sale are alarming. For example, in Satcom's home state of Montana, TCI currently has ownership interests in cable systems serving 51.6% of Montana's

cable subscribers. Group W also owns a significant number of cable systems in Montana with its subscriber level at 36.4%. Because of its already large presence in Montana, it is reasonable to assume that TCI will obtain all of Group W's Montana systems, to cluster its newly acquired systems near its already existing cable systems. Therefore, as a result of the Group W acquisition, TCI's Montana cable system holdings will soar to 88% of all Montana cable subscribers; Such a high regional concentration is far beyond any concentration level the Commission has ever addressed, either with respect to broadcast interests or cable interests." Source: Satcom, Inc. Petition for Rulemaking in RM-5475 (consolidated into MM Docket No. 89-600) at 17-18 (Feb. 21, 1986); CR VOL. I.S, EXH. 95, CR 11826-27.

152. The record included the following: "While Salt Lake is, for the moment, a unique situation given TCI's total dominance of the market, it is not an aberration. MSO's continue to swap systems to increase regional concentration. There also is the potential for danger if the ownership of a region's cable systems is concentrated in the hands of a few MSO's who then inter-connect their systems and begin working together to sell common advertising availabilities and program services (like TCI's cable-only 'Independent stations')." Source: INTV Statement in Support of Petition for Rule Making in RM 5475 at 10 (consolidated into MM Docket No. 89-600) (July 21, 1986); CR VOL. I.S, EXH. 97, CR 11877.

153. The record also indicated that: "While the failure of an MSO to carry a local television broadcast station in isolated franchise areas may not pose a threat to diversity of video outlets, such an act by an MSO whose cluster of cable systems covers the entire viewing area of one or more television stations poses a significant threat to diversity of expression and the promotion of localism. The elimination of the 'must carry' rules combined with the increased clustering of cable systems by MSO's constitute such dramatic changes in the cable television industry as to require the Commission to re-examine the need for multiple ownership restrictions for MSO's." Source: Satcom, Inc. Petition for Rulemaking in MM Docket No. 89-600 at 88 (Feb. 26, 1990); CR VOL. I.R, EXH. 87, CR 11546.

5. *Evidence That Cable Operators' Interest In Local Advertising Dollars Provides A Steadily Increasing Incentive To Deny Carriage To Local Broadcasters, And To Provide More Favorable Treatment To Cable Programming.*

154. The record included the following: "The local broadcaster is the cable operator's most direct competitor in the sale of advertising. The cable operator has a uniquely strong incentive to damage his competitors for local advertising by impeding their access to cable subscribers. His gatekeeper power allows him to do so selectively, dropping the carriage of some local stations and subjecting others to highly injurious channel placement or channel-shifting." Source: Comments of Chris-Craft Industries, Inc. in MM Docket No. 90-4 at 7 (Sept. 25, 1991); CR VOL. I.Q, EXH. 74, CR 11236.

155. Congress was aware that: "Cable and broadcast programming compete for advertising revenues. Cable operators' incentive to deny carriage or to provide disadvantageous carriage (*e.g.*, frequent or ill-timed channel repositioning) to programming services in which they have no financial interest appears to be particularly great as against local broadcasters. This creates a market disadvantage in local commercial broadcasters' ability to compete against cable operators for advertising revenues." Source: FCC Report, "In the Matter of Competition, Rate Deregulations and the Commission's Policies Relating to the Provision of Cable Television Service," MM Docket No. 89-600 at ¶ 11-12 (July 31, 1990); CR VOL. I.L, EXH. 23, 08980.

156. The record indicated that: "Another example of this economic incentive is when a cable operator desires to add a new cable-only service but has no additional channel capacity. By bumping the broadcaster off the system, he makes room for the cable-only channel. In doing so, he can see additional revenue through basic service fees or pay channel fees, plus any advertising he can sell adjacent to the cable channel's programs. In fact, the ability to sell ads on cable-only channels is perhaps the major incentive for cable operators to drop carriage of broadcast signals, where they cannot sell advertising. And with local cable system advertising revenues expected to grow significantly in the next few years, that incentive can only grow larger." Source: Letter from Senator Wirth to Mark S. Fowler, Chairman, FCC at 104 (Statement of Thomas L. Goodgame) (Sept. 19, 1985); CR VOL. I.I, EXH. 16, CR 06271.

157. The record indicated that: "The demise of the must-carry rules has also distorted, to the monopolist's benefit, the economic relationship between competitors for ever scarcer advertising dollars. The economics of advertising make local broadcasters and the cable systems competitors for advertising dollars, and create an economic and competitive rationale for denying local broadcasters access to the audience they are obligated to serve. Since cable subscribers must pay a monthly fee, they are, almost by definition, a more affluent market segment than that available to free over-the-air television. When a cable system is able to function as the 'gatekeeper' it effectively monopolizes for itself advertising dollars aimed at more affluent demographics, leaving the system's broadcast competitor with no access to the more desirable and more saleable demographics. Prevented, or at least hindered, from competing for advertising dollars, the economic structure supporting free over-the-air television is further dangerously weakened." Source: "Hearings on Must Carry" at 138 (Statement of Paul F. Crouch); CR VOL. I.F, EXH. 12, CR 04148.

158. Congress was also informed that: "Broadcasters are in a more precarious position because they compete directly with local cable operators for advertising revenue. This provides an added incentive to deny carriage or reposition a broadcast signal. If a broadcaster loses some of the audience, then it enhances the value of the cable system's program service. The loss of viewership also benefits the cable operator who is competing with the broadcaster for local advertising revenue. Thus, there is a double incentive for cable operators to take anti-competitive steps against broadcasters." Source: "Hearings on Cable Television Regulation" at 870-71 (Statement of James B. Hedlund); CR VOL. I.J, EXH. 18, CR 07874-75.

159. The record indicated that: "As cable advertising spot sales grow, local cable advertisers will have an increased incentive to block out or severely burden local broadcast stations which represent competition for advertising revenues." Source: "Hearings on Cable Television Regulation" at 232 (Letter and Statement Dated 3/19/91); CR VOL. I.J, EXH. 18, CR 07238.

160. The record also indicated: "Indeed, *cable has only begun to 'scratch the surface' of this revenue stream. As systems mature and penetration levels off, systems will turn increasingly to advertising for revenues.* The incentive to deny carriage to local stations is a logical, rational and, without must carry, a legal business strategy." Source: Appendices to Testimony of James B. Hedlund, President, Association of Independent Television Stations, Inc. Before the Subcommittee on Telecommunications & Finance, Committee on Energy & Commerce, U.S. House of Representatives at 118 (May 16, 1990) (Statement of James H. Quello) (emphasis added); CR VOL. I.M, EXH. 24, CR 09171.

161. The record included the following: "The real potential for abuse, as noted above, arises from the emergence of local cable operators as substantial com-

petitors in the sale of advertising time. As the Commission has observed, annual cable advertising revenues have more than tripled in the past five years, to almost $2 billion. Notice ¶ 3. When the cable operator couples its gatekeeper monopoly over the distribution facility with its financial interest in the sale of advertising time exclusively on cable channels, it obtains substantial incentives to impose discriminatory access restrictions on its broadcast competitors. If a local broadcast station receives high audience ratings, the cable operator enjoys only limited benefits from that success. Indeed, those higher ratings translate into lower ratings for cable channels on the same system, and lower rates for cable program advertisements. Thus, when a monopolist such as the local cable operator competes against local broadcasters for the sale of advertising time, he has the clear incentive to reposition or otherwise to inure them without regard to viewer demand. And to the extent that cable operators now curb their efforts to raise subscriber rates (voluntarily or through rate regulation), their incentives to obtain additional revenue from ads in cable programs at the expense of consumer preferences for local broadcast stations can only be expected to intensify. The cable industry's continuing assertions of a right to act on these incentives without restriction is wholly unfounded. It is as if the local telephone company sought the right, in entering a new business, to appropriate its principal competitor's telephone number to access all of his customers—or to make it difficult or impossible for those customers to call that competitor." Source: Comments of Chris-Craft Industries, Inc. in MM Docket No. 89-600 at 6-8 (March 1, 1990); CR VOL. I.S, EXH. 99, CR 11966-68.

162. The record included the following: "A cable operator has an incentive to [stop] carrying (not add) a local independent station in the hopes that this will lead [to] increased local cable advertising revenues, when the cable operator believes that:

* deletion of (not adding) the local station will increase the audience viewing levels on one or more advertiser supported cable-only channel,

* deletion of (not adding) the local station will reduce th audience of that station significantly enough to make advertising on cable-only channels more attractive to local advertisers, and

* the decline in subscription revenues associated with deleting (not adding) a local station if any, will be more than offset by increased cable advertising revenues." Source: "Hearings on Competitive Problems" at 323-4 (Statement of Edward O. Fritts); CR VOL. I.H, EXH. 14, CR 05256-57.

163. The record further indicated: "There is an increasingly strong incentive for cable to drop local broadcast signals. Cable operators are now aggressively competing with broadcasters for the advertising dollars that support free programming available to the public on TV stations. Carriage is no longer an issue of having sufficient channel capacity. The incentive not to carry local stations and preclude access to their local audience in order to obtain a competitive advantage. According to authoritative sources, cable advertising revenues in 1987 were over a *billion dollars*—and cable advertising is a relatively new phenomenon with great future growth. One study projects cable advertising revenue growth at a compound annual rate of 18.5%. Specifically, the competition for local advertising dollars is growing and will become more intense in the future. National spot sales on cable television have increased from 3 million in 1983 to 12.5 million in 1988. Cable has increased its local spot from 47 million in 1983 to 338.5 million in 1988, an *increase of over 720 percent.*" Source: Comments of Turner Broadcasting System, Inc. in MM Docket No. 90-4 at 17-18 (Feb. 14, 1991) (Statement of James H. Quello); CR VOL. I.M, EXH. 24, CR 09170-71.

164. It was reported in the record that: "A recent survey of cable operators established 'the emergence of local advertising sales as the top priority among operators." Source: Comments of the National Association of Broadcasters in MM Docket No. 89-600 at 27-28 (March 1, 1990) (citing *Multichannel News*, January 1, 1990 at 12.); CR VOL. I.T, EXH. 104, CR 12267-68.

165. The record also indicated: "The emerging involvement of cable in origination of local advertising must also be considered. This role is fundamentally inconsistent with cable's claimed position of a non-discriminatory 'conduit' of programming produced by others. These conflicting roles present regulatory problems that the Commission has not foreseen. The Commission has always assumed that a cable system's choice of the programming services it carries will necessarily be based on subscriber preferences, and thereby the public interest. However, now, in choosing whether to devote a channel to either a broadcast signal or a 'basic cable service,' the cable operator weighs not just subscriber preferences, but whether the signal will provide advertising availabilities, and revenues, directly to the cable operator. The same choice confronts the cable operator every time it makes a channel positioning decision. Cable operators face an inherent conflict of interests in such situations—between the needs and desires of subscribers, and their own financial interests." Source: Comments of Fisher Broadcasting Inc. in MM Docket No. 89-600 at 5 (March 1, 1990); CR VOL. I.GG, EXH. 205, CR 18163.

166. The record also indicated: "Another prominent example of non-price competition involves channel placement on cable systems. Cable systems which compete with local television stations for audience and local advertising have an incentive to place cable programming on channels that will maximize viewership of those channels. This incentive increases in those cases where the cable system operator has an ownership interest in the

cable channel. The FCC itself has discovered evidence of this practice. One would expect such activity to increase as non-price program competition becomes more acute in the future." Source: Dr. James A. Clifton, Principal Consultant, Nathan Associates, Inc., "Must Carry and Effective Competition in the Emerging Video Marketplace: A Re-examination of the Evidence" (Oct. 25, 1991), submitted on behalf of INTV in MM Docket 90-4 at 22 (October 25, 1991); CR VOL. I.GG, EXH. 203, CR 18144.

6. *Evidence From Broadcast Stations—And Public Statements By Cable Operators—Provided Further Evidence That Local Advertising Competition Provided An Incentive To Disfavor Local Broadcasters.*

167. The record included the following: "Shifts are made solely to enhance the competitive position of the cable operator's programming and his advertising availabilities. Any doubt regarding the motivation for the cable channel shifts can be resolved by the candid explanation of one major MSO—Jones Intercable. In a May 27, 1987 letter to advertisers, Jones described its motivation for a recent channel shift as follows:

> On March 1, 1987, *Jones Intercable made changes that greatly enhanced the value of advertising placed with us. On that date, we realigned our channels bringing four of the five channels* (The Nashville Network-4, Cable News Network-6, ESPN-12, and USA-8) *on which we insert advertising to channel positions between 2 and 13.*
>
> Studies performed on viewership patterns on channels 2 through 13 show that they are viewed 30% more often than higher channel positions. This means that the advertiser's exposure to area consumers increased greatly without additional cost.

Source: "Hearings on Cable Television Regulation" at 880-81 (Statement of James B. Hedlund) (emphasis added); CR VOL. I.J, EXH. 18, CR 07884-85.

168. The record also included the following information: "United Cable Television Corp. is also looking at system-by-system lineups, with an eye toward putting cable services 'with the greatest potential' on the lower bandwidths and near broadcast affiliates, said Nimrod Kovacs, vice president of marketing. Services with potential, he said, are those with consumer appeal or those with possibilities for strong local ad sales. *He said he believes a cable service moved to a lower-numbered channel could gain 50 percent in local ad sales, 'if not double.'* " Source: "Hearings on Competitive Issues" at 661 (article from *Multichannel News*, Sept. 8, 1986) (emphasis added); CR VOL. I.C, EXH. 8, CR 02000.

169. The record also included the following report regarding Plantation Cablevision's decision not to carry WTGS on Hilton Head cable system in South Carolina: " 'Of course, as an advertising medium, we are competitors with WTGS. And, as a business, it does not make sense to subsidize a competitor if you don't have to.' " Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 24 (Sept. 25, 1991) (Free Television Under Siege, INTV, (May 1988)); CR. VOL. I.K, EXH. 21, CR 08578.

170. The record indicated: "The reasons why Tulsa Cable has flatly refused to carry KWHB and has declined to negotiate the price of carriage, are readily apparent. Tulsa Cable is in direct competition with KWHB, by offering its own cable religious channel on the Tulsa Cable system. Tulsa Cable offers time on this religious channel to various religious programmers and advertisers, including many who would ordinarily purchase time or advertisements on an over-the-air broadcast television station such as KWHB. Essentially, Tulsa Cable deliberately excludes KWHB from its system and thereby forces religious

programmers and advertisers to choose between circulation in cable homes on Tulsa Cable's religious channel, and circulation in non-cable homes on KWHB. If religious programmers or advertisers want to reach the audience in Tulsa's cable households, they must place their programs and advertisements on the Tulsa Cable religious channel. Moreover, because KWHB can only sell circulation in non-cable homes to advertisers, Tulsa Cable has placed a 'ceiling' on the rates which KWHB may charge its advertisers, and made KWHB a limited distribution medium in the Tulsa television market. This severely impairs KWHB's ability to compete not only with Tulsa Cable's religious channel, but also with other broadcast television stations in the Tulsa market which are carried on the Tulsa Cable system." Source: "Hearings on Competitive Issues" at 725-26 (Letter from Peter Sumrall); CR VOL. I.C, EXH. 8, CR 02064-65.

171. The following information was included in the record: "At least two of the larger cable systems on Long Island have substantial local advertising operations. Cablevision, the largest cable operator on Long Island, with 242,000 subscribers, has reported revenues of nearly $4 million from its sales of advertising. Viacom Cable, with 105,000 subscribers, has reported advertising revenues of approximately $1 million. In most cases, cable advertising revenues come from the sale of local availabilities on national cable programming channels. As direct competitors with WLIG for local ad revenues, cable operators can be expected to try to weaken the station by denying it access to their cable systems and thereby denying it access to their subscribers. In fact, this has proven to be the case. Cablevision, the largest cable operator on Long Island, has refused to carry WLIG on any of its Nassau or Suffolk County cable systems. Viacom, while it has carried WLIG, has relegated the station to a more costly tier, denying access to 40,000 Suffolk County subscribers. Thus, these two operators together, WLIG's chief competitors for television advertising on

Long Insland, have in combination denied WLIG access to 292,000 of its potential 864,000 households." Source: Comments of WLIG in MM Docket No. 85-349 at 19 (Jan. 29, 1986); CR VOL. I.AA, EXH. 155, CR 15693.

172. The record included the following: "In late 1986, a major multiple system owner ('MSO') began moving KBHK from its position as 'Bay Area Cable 12' to positions farther up the dial on seven different Bay Area cable systems: Sunnyvale, Pacifica, Fremont, San Mateo, Daly City, San Carlos, and Travis Air Force Base. Not only was KBHK removed from its established position on channel 12, it was given different new positions on each of the seven cable systems. And it was replaced with a cable program channel, which competes with KBHK for the sale of local advertising and in which the MSO owned a major equity interest. The MSO promised KBHK that these shifts were only 'temporary' and that KBHK would return to channel 12 in a matter of months. Those months have stretched into four years and counting; KBHK remains stuck in differing positions farther up the dial on each of those systems today." Source: Comments of ChrisCraft Industries, Inc. in MM Docket No. 90-4 at 10-12 (Sept. 25, 1991); CR VOL. I.Q, EXH. 74, CR 11239-41.

173. The record indicated that: "[I]n the short time since the 'must-carry' rules were vacated, WVAH-TV has already received a letter from one cable operator, Tel-Com, Inc. in Harold, Kentucky, suggesting that payments (in the form of spot time) for carriage be made in the future if WVAH-TV wishes to reach the audience it is licensed to serve. *See* letter attached. The cable operator's request was made even though WVAH-TV has high ratings in the counties Tel-Com serves and offers exclusive coverage of Cincinnati Reds baseball games and many local college sporting events not otherwise available on the Tel-Com system. According to the cable operator, 'we feel all the local channels should pay us

in order for us to carry them because they are competing for advertising.' *See* 'Ignoring the Alligators,' *Broadcasting*, at 10 (Nov. 18, 1985)." Source: Comments of Meridian Communications Corporation on Notice of Inquiry and Notice of Proposed Rulemaking, MM Docket No. 85-349 at 4 (Jan. 29, 1986); CR VOL. I.AA, EXH. 156, CR 15712.

174. The record also indicated that: "In April of 1988, the Panama City market began to receive service from its first Independent station—WPGX. In fact, it is only the third station in the entire market (the affiliate of one network and the public station are imported from adjoining markets). WPGX plans—in addition to a vast array of top syndicated shows and movies—a lot of local programming. In spite of this, the major cable system in the market—Comcast, serving Panama City—has told WPGX that it will not carry the station. According to the cable system, there is no room on their system for the new local business. There is, however, room for *16* cable services on which Comcast sells local advertising, including a home-shopping service (partially owned by the cable company)—plus a Sunshine Sports Network also partially owned by the cable company—plus *two* rock video channels. Lest the significance of Comcast's turndown be misunderstood, this is not a minor inconvenience for WPGX. Panama City is the 171st television market in the country; being denied access to all cable subscribers in the major population center of the market will seriously affect the viability of WPGX." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 21 (Free Television Under Siege, INTV (May 1988)) (Sept. 25, 1991); CR VOL. I.K, EXH. 21, CR 08575.

175. The following information was in the record: "Cape Cod's only television station—had the misfortune of signing on July 19, 1985, the day the must-carry rules were invalidated in the *Quincy* case. On January 22,

1988, the station was taken over by its leading creditor. The single largest factor forcing the sale back to the bank, according to the owner, was the station's failure to gain access to the vast majority of the area's cable subscribers. As of January 1986, WCVX was available to less than 4% of the 200,000 cable subscribers it was licensed to serve. Two years later, 145,000 cable subscribers were still denied access to their only local station. WCVX was not only the Cape's only station, it was one of the only two stations within 50 miles (the other is a Providence/New Bedford network affiliate). From the first day, WCVX sought to serve its viewers with a steady diet of local news (2—30 minute newscasts a day) and local events (extensive coverage of high school, sporting events, etc.). Not coincidentally, the largest cable system in the area, the TCI system serving Barnstable County, also produces a local news program and sells commercials in competition with WCVX. TCI let over two years go by before it finally added WCVX to its 35,000 subscriber system in compliance with the Commission's revised must-carry rules." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 11 (Sept. 25, 1991) (Free Television Under Siege, INTV (May, 1988)); CR VOL. I.K, EXH. 21, CR 08565.

176. The following information was in the record: "WDBB—Tuscaloosa's only Independent station—was understandably upset when Comcast's Tuscaloosa cable system announced its intention to move WDBB from cable channel #12 to channel #17. Since the other local stations were retained on the first twelve channels, WDBB alone was in a position where only cable subscribers with cable-ready sets or able to afford converter boxes could view the station. In response to WDBB's complaint, the general manager of the Comcast system, Kim Kersey, explained that in filling the first twelve channels . . . 'we selected those (services) we felt would drive our business best. Consideration was given to major network programming, viewer popularity of cable networks, subscriber convenience and *potential for local advertising sales . . .*' (emphasis added)." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 11 (Sept. 25, 1991) (Free Television Under Siege, INTV (May, 1988)); CR VOL. I.K, EXH. 21, CR 08565.

177. The record included the following: "This letter is in response to your inquiry concerning our difficulties with cable television companies. In fact, WDBB-TV has been shifted on Group W Cable's Tuscaloosa franchise. The station was moved from Channel 12 (Basic) to Channel 17 (Midband) in mid 1988. We voiced our concern to the Tuscaloosa City Council, and Mr. Kim Kersey, System Manager for Group W Cable in Tuscaloosa. We were told by Mr. Kersey 'your station is unimportant'. Mr. Kersey replaced WDBB-TV on Channel 12 with USA Network, a cable service upon which he markets local advertising time." Source: Reply Comments of the National Association of Broadcasters, Appendices, in MM Docket No. 89-600 (April 2, 1990) (Letter from David DuBase); CR VOL. I.X, EXH. 119, CR 14281.

178. The record indicated that: "KICU-TV has been repositioned to higher channels on 13 cable systems in the San Jose/San Francisco area, and on virtually all of these systems, advertiser-supported pay cable services such as ESPN, CNN and USA Network have been placed on the lower channel. Because these services compete directly with the stations for advertising, the repositioning has a direct, detrimental impact on a station's revenues." Source: Comments of Shamrock Broadcasting, Inc. and Ralph C. Wilson Industries Inc. in MM Docket No. 88-138 at 5 (July 8, 1988); CR VOL. I.Z, EXH. 135, CR 15250; *see* also Reply Comments of the National Association of Broadcasters, in MM Docket No. 88-138 at 4 (Aug. 8, 1988); CR VOL. I.Z, EXH. 143, CR 15365.

179. The record included the following: "WUAB was Cleveland's first independent station, and is now 20 years old. In addition to a heavy schedule of movies, top-rated syndicated shows and sports, the station has inaugurated a local news show. Nonetheless, Cablevision Systems, owner of six suburban cable systems suddenly moved WUAB from its long-established channel position in the lowest tier up to various high channel numbers including 22 and 28 (not their off-air channel). The cable operator, in turn, used the channel vacated by WUAB for ESPN, and other services on which he sold local advertising." Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 29 (Sept. 25, 1991) (Free Television Under Siege, INTV (May 1988)); CR VOL. I.K, EXH. 21, CR 08583.

180. The record included the following information: "*KTVU & KBHK—San Francisco, CA.* In late November, 1986, TCI notified the San Francisco area Independent stations of its plans to shift their channel locations. . . . TCI claimed its move was based on a 'comprehensive survey of subscriber attitudes' and was intended to 'provide the most popular services on the first twelve cable channels.' KTVU—which broadcasts on channel #2—and KBHK—which broadcasts on Channel #44 but has been carried on cable channel #12 for over 20 years—were to be repositioned in the upper end of the cable dial. Other Bay area Independents were to suffer a similar fate. Even though KTVU and KBHK are the highly-rated #1 and #2 Independents in this, the 4th largest television market in the country, TCI planned to move them out of the first twelve cable channels. In their place TCI planned to substitute cable services on which it sold advertising and—in several instances—in which TCI held an ownership position. Although TCI temporarily postponed the relocation of KTVU, it nonetheless went ahead with the shift of KBHK. TCI, incidentally does not provide free converters for additional

set hook-ups, meaning that KBHK is *not* available on thousands of sets hooked to TCI's cables." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 9 (Sept. 25, 1991) (Free Television Under Siege, INTV (May 1988)); CR VOL. I.K, EXH. 21, CR 08563.

181. The record also indicated: "WFAT-19 (IND), Johnstown-Altoona, PA, Timothy Lee Crosby, 'We fought to get on. We got on in July 1985. We were on for 10 weeks then got dropped when the judge wouldn't uphold the old law until everything was settled in court. They dropped us that day within a couple of hours. We were on channel 4 which wasn't too good because there is a channel 4 from Pittsburgh causing interference, but we were glad just to be on. They did their own survey which showed that 30% of their subscribers wanted us back. I think they dropped us, they were ready to sell their own time. They had an agreement with Cable Adnet. Adnet is all over the country and they go to an area and work out agreements with local systems so they sell time on their stations and we would be competitors for them. A recent Arbitron survey shows we have a 5% share of cable homes. So it comes down to economic reasons and spite. We're upset about this because we are a small operator and we positioned our antenna so that we could be in the Johnstown and Pittsburgh markets.'" Source: Comments of the National Association of Broadcasters, Appendix Volume, in MM Docket No. 88-138 at 1 (July 8, 1988) (WFAT-19); CR VOL. I.Y, EXH. 128, CR 14978.

182. The following information about KTVI was in the record: "*KTVI, St. Louis, Missouri*—[was] replaced on a Sammons Communications cable system by CNN from which Sammons receives 25% of the gross sales made by the company selling local ads on the system." Source: Reply Comments of the National Association of

Broadcasters, in MM Docket No. 88-138 at 3 (Aug. 8, 1988); CR VOL. I.Z, EXH. 143, CR 15364.

183. The following was included in the record: "WNEG (Toccoa, GA) cited a situation whereby a[t] least one cable system chose not to carry it because of competition for advertising. A local cable system trying to sell advertising used noncarriage as a means of reducing advertising competition. WNEG was replaced with TNT on this system." Source: Comments of the National Association of Broadcasters in MM Docket No. 89-600 at 3 (March 1, 1990) (Exhibit 5); CR VOL. I.T, EXH. 104, CR 12313.

184. The record also indicated that "*KCPQ-TV and KSTW-TV, Tacoma, Washington*—[were] repositioned to higher channels on a number of TCI systems; replaced by various advertiser supported channels." Source: Reply Comments of the National Association of Broadcasters, in MM Docket No. 88-138 at 4 (Aug. 8, 1988); CR VOL. I.Z, EXH. 143, CR 15365.

185. It was also reported in the record that: "United Artists Cablevision Corp., a cable operator in the "Tri-Cities" market of Pasco-Richland-Kennewick, Washington, recently 'repositioned' KEPR-TV, the local CBS affiliate, from cable channel 7, where it had been carried for over 25 years, to cable channel 19, and replaced it on the lower channel with a program preview service. This change was made despite the fact that cable channel 19 is subject to severe interference from two-way business radios and high-powered paging systems that produce an obscuring pattern on the television screen. The repositioning is likely to have a serious adverse impact on KEPR' TV's local audience, because of both subscriber confusion and poor signal quality. The channel repositioning is particularly troubling in light of the recent comments by an executive of United Artists that his cable systems' revenue growth in coming years will be largely from a growth in advertising revenues, an area

in which he competes directly with local television stations." Source: Comments of the 97 Television Stations in MM Docket No. 89-600 at 5-6 (March 1, 1990); CR VOL. I.S, EXH. 100, CR 11999-2000.

B. Evidence That Increasing Vertical Integration Between Large MSO's And Cable Programming Networks Provide Cable Operators A Significant And Growing Incentive To Carry Cable Networks, Rather Than Local Broadcast Stations.

1. *Evidence Of Vertical Integration In The Cable Industry.*

186. Congress was aware that: "The record in this proceeding shows that the same MSOs that have grown horizontally since 1984 have also acquired more and more interests in cable programming services and networks. For example, TCI, the country's largest MSO, presently owns equity interests in 22 cable networks. Time Warner, the second largest MSO, holds interests in 8 cable networks. And Cox Cable, which ranks as the fifth largest MSO, has equity interests in 6 cable programming services." Source: FCC Report, "In the Matter of Competition, Rate Deregulations and the Commission's Policies Relating to the Provision of Cable Television Service," MM Docket No. 89-600, ¶ 77 at 46 (July 31, 1990); CR VOL. I.L, EXH. 23, CR 09018.

187. The record also indicated that: "There are approximately 80 different satellite television programming services in existence, and more than half of such services are owned in whole or in part by cable. Indeed, even as the number of programming services has burgeoned, the pace of vertical integration has increased, so that cable's ownership percentage has remained constant during the last several years. TCI, the largest cable operator in the country, already holds equity interests in the following programming sources: WTBS, CNN, and Headline

News, all owned by Turner Broadcasting System (14.16%); Cable Value Network (20%); American Movie Classics (50%); Black Entertainment TV (16%); Event TV (10%); Discovery (14%); and Fashion Channel (10.5%)." Source: "Hearings on Competitive Issues" at 145-46 (Letter to H. Walker Feaster); CR VOL. I.C, EXH. 8, CR 01484-85.

188. The following facts were in the record: "With respect to the trend towards vertical integration, TCI has been a leader. TCI holds an equity stake in a number of major programmers, including WTBS, CNN, Headline News, Black Entertainment Television, Tempo TV, the Fashion Channel and American Movie Classics." Source: "Hearings on Competitive Issues" at 24 (Statement of James Theroux); CR VOL. I.C, EXH. 8, CR 01363.

189. The record indicated that: "More and more cable programming services are owned, in whole or in part, by one or a consortium of cable MSO's, or multiple system operators. In fact, MSO's have ownership in seven of nine national pay cable networks and 20 of 52 basic cable networks, including 12 of the top 20 basic cable networks." Source: "Hearings on Cable Television Regulation (Part 2)" at 107 (Statement of Thomas L. Goodgame); CR VOL. I.I, EXH. 16, CR 06274.

190. Congress was aware that: "The Discovery Channel and the Learning Channel are majority-owned by three cable operators: Cox Cable Communications, Newhouse Broadcasting, and Tele-Communications, Inc." Source: "Hearings on Cable Television Regulation" at 251 (Statement of John S. Hendricks); CR VOL. I.J, EXH. 18, CR 07256.

191. The record indicated that: "TCI and ATC's parent Time, Inc. each own substantial shares of Cable Value Network, the Fashion Channel, Black Entertainment Network, Cable News Network, Turner Broadcasting and Headline News, accounting for 47 percent of all

subscribers, 23 percent of all basic service subscriptions and 67 percent of all pay services." Source: "Hearings on Cable Television Regulation (Part I)" at 140 (Statement of Gene Kimmelman); CR VOL. I.G, EXH. 13, CR 04338.

192. The record included information showing that Cablevision had acquired equity interests in Bravo; AMC (50%); CNBC (50%); Sports Channel (50%); and Sports Channel Amer. (50%). Source: "Hearings on Cable Television Regulation" at 868 (Statement of James B. Hedlund); CR VOL. I.J, EXH 18, CR 07872.

193. The record included information showing that Viacom had acquired equity interests in MTV/VH1; Nickelodeon; The Movie Channel; Lifetime (33%); Pacific Sports Network (50%); Prime Northwest Sports Net. (50%); and Showtime. Source: "Hearings on Cable Television Regulation" at 868 (Statement of James B. Hedlund); CR VOL. I.J, EXH. 18, CR 07872.

194. The record included information that Time/Warner had acquired equity interests in BET; HBO/Cinemax; Comedy Channel; TBS (CNN; TNT, Headline News); WTBS. Source: "Hearings on Cable Television Regulation" at 868 (Statement of James B. Hedlund); CR VOL. I.J, EXH. 18, CR 07872.

195. The following facts were in the record: "TCI, is not the only MSO actively acquiring programming interests. ATC (Time/Warner), the second largest MSO with 5.6 million subscribers wholly owns HBO, Cinemax, and Lorimar Telepictures and has an ownership interest in Turner, Black Entertainment Network and Cable Value Network. There have been recent press reports that Warner Communications' and Time Inc.'s desire to get into the basic cable business will be greatly enhanced now that the two companies have merged. As one cable network President observed, '[i]f they were both 900-pound gorillas before, now they're a 2,000 pound gorilla.'

Viacom, with its 1.5 million subscribers, is the seventh largest MSO. It wholly owns MTV Networks, Inc., Showtime, Nickelodeon, and The Movie Channel and maintains a partial interest in Turner, Lifetime and Cable Value Network. Cablevision, an MSO with 1.13 subscribers, is the sole owner of Rainbow Network, Bravo and Sports Channel and a partial owner of American Movie Classics and Turner." Source: Cable Television Regulation (Part 2): Attachments to NAB Testimony in Hearings Before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce, 101st Cong., 2d Sess., Appendix D, at 1-2 (May 16, 1990) ("First Amendment Analysis of the Must Carry Statute," by P. Cameron Devore et al.); CR VOL. I.L, EXH. 22, CR 08822-23.

196. Congress was also aware of the following information: "The Committee notes the explosive growth in vertical relationships between cable operators and program suppliers. According to NCTA, there are 68 nationally delivered cable video networks, 39 of which, or 57 percent, have some ownership affiliation with the operating side of the cable industry." Source: "1992 House Report" at 41, CR VOL. I.A, EXH. 4, CR 00420.

2. *Evidence That By The Late 1980's Increased Vertical Integration In The Cable Industry Made It Extremely Difficult To Launch A Programming Network Without Providing Ownership Interests To Large Cable MSOs.*

197. The record included the following: "It is apparent that vertical integration of the cable industry has accelerated since passage of the 1984 Cable Act. In fact, the Cable Act presents somewhat of a line of demarcation in the vertical integration of the industry. In the years before passage of the Act, numerous independent cable channels (*i.e.*, without MSO equity participation)

began operation, and many of these continue to enjoy high subscribership. Data presented in this proceeding show that only thirty-eight percent (14 of 37) of the channels that pre-date passage of the Cable Act are vertically owned. Data for channels begun since passage of the Cable Act present a significantly different pattern. Sixty-four percent of cable channels launched since passage of the Cable Act (21 of 33) are vertically owned. Furthermore, post-Cable Act channels which are vertically owned enjoy significantly higher subscribership (and correspondingly higher ratings) than new non-vertically owned channels. For example, Tables VII and VIII of Appendix G present subscribership and ratings data for the most popular cable channels. Only three post-Cable Act channels appear among the 15 channels with the highest subscribership and ratings; all three (TNT, The Discovery Channel and Nickelodeon) are vertically owned. In fact, FNN/Sports, the post-Cable Act independent programmer with the highest subscribership, has less than half of the subscribers of the vertically owned Discovery Channel." Source: FCC Report, "In the Matter of Competition, Rate Deregulations and the Commission's Policies Relating to the Provision of Cable Television Service," MM Docket No. 89-600 ¶ 79-80 at 46-47 (July 31, 1990); CR VOL. I.L., EXH. 23, CR 09018-19.

198. The record indicated that: "If these market trends continue for much longer, the cable industry could well be left with only a handful of vertically integrated 'mega-MSOs,' controlling vast amounts of subscribers and programming services, with little room left for competition at either the system or the programming levels." Source: "Hearings on Competitive Problems" at 30-31 (Statement of Glenn Manishin); CR VOL. I.H., EXH. 14, CR 004963-64.

199. The following was in the record: "Over the past two years cable operator vertical integration with

respect to ownership and equity participation in national cable programming has increased significantly. According to *Broadcasting*, '[C]able operator ownership and equity participation . . . have rapidly become the quid pro quo for launching new [cable] services. [Citing 'Vertical Integration: The Business Behind the Boom in Cable Programming.' *Broadcasting*, November 23, 1987, at 40-2.] For example, in announcing its recent purchase of Tempo Cable Channel, NBC stated it planned to sell as much as 49% of the channel to cable operators in an attempt to 'lure' them into carrying the channel. [Citing *The Wall Street Journal*, May 4, 1988 at 28.] According to NCTA's James Mooney, cable system operators have ownership and equity participation in 61 percent of all current and planned cable program networks." Source: "Hearings on Competitive Problems" at 335-36 (Statement of Edward O. Fritts); CR VOL. I. H, EXH. 14, CR 05268-69.

200. The record also indicated the following: "But in the past 18 months, cable operator ownership and equity participation—the foot soldiers of vertical integration—have rapidly become the quid pro quo for launching new services." Source: *Broadcasting*, Nov. 23, 1987, p. 40 (included in the record in "Hearings on Competitive Issues" at 416, CR VOL. I.C., EXH. 8, CR 01755).

201. The following information was in the record: "According to the *Wall Street Journal* (May 4, 1988 at 29), 'Cable system owners have taken minority equity interest in virtually every new programming channel that has started in the past two years.' As a practical matter, it is almost impossible in the present environment to start a new cable program service without surrendering equity to the owners of the monopoly cable conduits." Source: *Media Ownership: Diversity and Concentration, Hearings Before the Subcommittee on Communications of the Committee on Commerce, Science, and Transportation*, 101st Cong., 1st Sess. (June 14, 21 and 22, 1989)

(hereafter "Hearings on Media Ownership") (Statement of Preston Padden); CR VOL. I.E, EXH. 10, CR 03028.

202. The record indicated that: "Further, in order to secure carriage, many programmers have to offer equity interests in their programming to MSOs. The Comedy Channel, for example, offered MSOs 50 percent of its equity in order to secure carriage of the program by those MSOs. In order to obtain enough viewers to secure Nielsen ratings, The Travel Channel had to sell eight percent of its equity to cable operators in exchange for carriage. As a result of the sale, The Travel Channel projected that its viewing audience would increase by four million." Source: Comments of the City of New York, et al. in MM Docket No. 89-600 at 62 (March 1, 1990); CR VOL. I.U., EXH. 110, CR 13143.

203. The record indicated that: "The situation may be growing even more serious than this overview indicates. For example, as the NEW YORK TIMES points out, 'not one major new program service has been introduced in the past year in which cable operators have not become equity partners. The TIMES quotes an industry observers" 'Entrepreneurs seem to be reluctant to start a service unless they can get distribution. The only way to be sure of getting that is to give the cable operator an interest." Source: *Cable Television: Hearings Before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce*, 101st Cong., 2nd Sess. at 374-75 (March 30 and May 11, 1988) (hereafter "Hearings on Cable Television") (Statement of Jack Valenti); CR VOL. I.D, EXH. 9, CR 02460-61.

204. The record indicated that: "In his written submission to this Subcommittee on March 30, 1988, James P. Mooney, President and Chief Executive Officer of the National Cable Television Association ('NCTA'), offered somewhat different figures that lead to the same conclusion. He reported that only seven of the 27 national pro-

gramming services launched since January 1985 have no cable ownership. He also said that only three of the twelve planned programming services have no cable ownership. In other words, according to the NCTA, 74.4 percent (29 out of 39) of the programming services launched or to be launched have cable ownership." Source: "Hearings on Cable Television" at 42 (Statement of Jack Valenti); CR VOL. I.D, EXH. 9, CR 02461.

205. The record indicated that: "As a practical matter, it is impossible in the present environment to start a *new* cable program service without surrendering equity to the owners of the monopoly cable conduits. The only program services that have succeeded *without* operator equity (ESPN, USA, Disney, etc.) are those that start *before* the current trend toward vertical integration." Source: "Hearings on Cable Television" at 536 (Statement of Preston Padden); CR VOL. I.D, EXH. 9, CR 02625.

206. The record included the following: "Some independent [*i.e.*, non-vertically integrated] programming channels are among those with the highest subscribership. For example, the cable channel with the highest subscribership is independently owned ESPN. However, all of the independent channels, with the highest subscribership and ratings were established—in most cases well established—before passage of the 1984 Cable Act." Source: FCC Report, "In the Matter of Competition, Rate Deregulations and the Commission's Policies Relating to the Provision of Cable Television Service," MM Docket No. 89-600 ¶ 81 at 47 (July 31, 1990); CR VOL. I.L, EXH. 23, CR 09019.

207. The record also indicated: "Four of the ten largest MSO's have been establishing ownership relationships with basic and pay programming services. TCI, which is the nation's largest MSO with more than 8 million subscribers and 16.4% of all cable subscribers, has

a partial ownership interest in Turner Broadcast System (which includes WTBS, CNN, Headline News and TNT), American Movie Classic, QVC/The Fashion Channel, The Discovery Channel, Cable Value Network, Black Entertainment Network and Showtime. As one industry analyst has noted, [f]or several years it's been difficult to even think about launching a network without TCI as a participant. It can be done, but you're 20% there if you get TCI." Source: 141-4 (Appx. D)—1. Cable Television Regulation (Part 2): Attachments to NAB Testimony in Hearings Before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce, 101st Cong., 2d Sess. Appendix D at 1 (May 16, 1990) ("First Amendment Analysis of a Must Carry Statute," by P. Cameron Devore et al.); CR VOL. I.L, EXH. 22, CR 08822.

208. The record indicated: "The article also reports that the five fastest start-ups among basic cable networks (and their subscriber count after five years of operation) were Nickelodeon/Nick-at-Nite (44.6 million), Discovery (42.8 million), TNN (37.4 million), A&E (37.1 million), and VH-1 (34.4 million). *Only one* of the five, TNN, has no MSO ownership or interest." Source: Reply Comments of INTV in MM Docket No. 89-600 at 50 (April 2, 1990); CR VOL. I.X, EXH. 121, CR 14471.

209. The following information was in the record: "The TBS story is but one example of the tremendous vertical integration which has also occurred in the cable industry during the past five years. Of the five wireless cable must carry programmers—HBO, ESPN, Showtime, TNT and SportChannel America—three (HBO, TNT and SportChannel America) are owned or controlled by cable MSOs. A fourth, Showtime, recently announced that it is selling a half interest to TCI, the country's largest MSO. ESPN (the most available must carry program) is the only programmer in which a cable MSO

does not hold an equity interest. Indeed, since 1987, not one new programming network has been launched without cable ownership or control." Source: Submission of Summary Report by Wireless Cable Association, Inc. in MM 89-600 at 19-20 (rec'd May 23, 1990); CR VOL. I.X, EXH. 127, CR 14600-01.

210. The record included the following: "As recently summarized by Hal Richardson, Senior Vice President Television, Walt Disney Television: 'The top ten MSO's control over 50% of the cable subscribers in this country. Every one of these top ten MSO's has an equity interest of at least 10% in at least one programming service.' 'In fact, there are only six major cable program services which have no MSO equity interest. All of these six services were launched prior to February 1984. There has been no major program service launches successfully in the past six years without significant MSO equity interest.'" Source: Comments of the Association of Independent Television Stations, Inc. in MM Docket No. 89-600 at 37 (March 1, 1990) (quoting Opening Statement by Hal Richardson, Senior VP Pay Television, Walt Disney Television, before the FCC Hearing, Los Angeles, California (February 12, 1990)); CR VOL. I.U, EXH. 107, CR 12603.

211. The record indicated that: "It is an economic reality that no new programming networks have been launched in the last three years without a controlling interest or significant ownership interest by the large MSOs. *Diversity and Concentration Hearing* at 4 (Statement of Robert L. Schmidt) Cable operator ownership and equity participation is now 'the *quid pro quo* for launching new cable services.' Broadcasting, November 23, 1987 at 40-2. *See also* Smooshan Article, *supra* at 237. The franchised cable operators use their local distribution monopolies to gain leverage over the program supplier. The equity interest given the franchised cable operator is the means by which the programmer can obtain guaranteed carriage for its network. *Id.*" Source: Comments of the National Private Cable Association in MM Docket No. 89-600 at 29 (March 1, 1990); CR VOL. I.U, EXH. 109, CR 13020.

3. *Evidence That These Vertical Relationships Provided A Significant Incentive For Cable Operators To Favor Their Integrated (i.e., "Affiliated") Cable Programmers.*

212. The record indicated that: "This vertical integration has produced a profound change in the nature of the cable industry. Cable operators are no longer merely passive and distinterested retransmitters of broadcast programming. Through their equity interest, and through the sale of local advertising availabilities, cable operators now have a clear vested interest in the competitive success of *some* of the programming services seeking access through their conduit. You don't need a Ph.D. in economics to figure out that the guy who controls a monopoly conduit is in a unique position to control the flow of programming traffic to the *advantage* of the program services in which he has an equity investment and/or in which he is selling local advertising availabilities, and to the *disadvantage* of those services, including local broadcasting stations, in which he does not have an equity position." Source: "Hearings on Competitive Issues" at 546 (Statement of Milton Maltz); CR VOL. I.C, EXH. 8, CR 01885.

213. The following was included in the record: "Apart from creating distortions in the program market, vertical integration when combined with a local monopoly bottleneck creates dangerous anti-competitive incentives. First, there is a strong incentive for cable operators to favor their own programming services over what is perceived to be competitive independent services." Source: "Hearings on Cable Television Regulation" at 869 (Statement of James B. Hedlund); CR VOL. I.J, EXH 18, CR 07873.

214. Congress was informed that: "The reality is that vertically integrated cable systems favor their own programming services. This should come as no surprise. TCI's plan to insert Encore into its lineup proves the point. A recent article in Multichannel News explains. 'Sources said TCI's system managers have now been told to make their own choices in removal and realignment by June 1. The system managers will be looking at both license fees and viewership levels in deciding which networks to pull. It is unlikely that managers will be allowed to pull any of the networks in which TCI has investments, such as Black Entertainment Television, American Movie Classics, The Family Channel and the Discovery Channel. Turner Broadcasting [S]ystem Inc. (TCI is an investor there too) and MTV networks work on a multichannel network discount and are also unlikely to be pulled.'" Source: "Hearings on Cable Television Regulation" at 870 (Statement of James B. Hedlund) (citing *Multichannel News,* May 13, 1991 at 16); CR VOL. I.J, EXH. 18, CR 07874.

215. The record included discussion of "the disastrous consequences which have occurred as the result of cable's vertical integration. Cable operators have purchased major equity positions in most major cable program services. This gives those operators a strong self-interest in making sure that those services are well-positioned on cable dials to the detriment of broadcasters and others . . ." Source: "Hearings on Cable Television Regulation" at 870 (Statement of Edward O. Fritts); CR VOL. I.J, EXH. 18, CR 07782.

216. The record indicated: "Commerce Department data show that ATC discriminates against cable rival Viacom by favoring affiliated programmers HBO, Cinemax, USA and Black Entertainment Network. In return, Viacom engaged in the same type of discriminatory practice." Source: "Hearings on Cable Television Regulation" at 870 (Statement of Gene Kimmelman); CR VOL. I.J, EXH. 18, CR 07717.

217. The record also indicated that: "Vertical integration by the industry's leading firms has revealed a variety of problems that harm the economic interests of consumers and the public interest generally. First, as the integration has occurred, the firms have shown a general preference for products produced at a higher stage by their integrated firms. Thus, cable networks and multiple network providers have chosen to carry their own programming at the expense of other programming. In some cases, it appears that systems operators who own networks have deliberately kept competitors off their systems or placed them in less desirable channel locations." Source: "Hearings on Cable Television Regulation (Part 2)" at 261 (Statement of Robert G. Picard); CR VOL. I.I, EXH. 16, CR 06428.

218. The following information was in the record: "In addition, many of the nation's largest cable MSO's own substantial equity interests in nonbroadcast cable services, and thus have natural and strong proprietary interests in maximizing viewership of these nonbroadcast services as against local broadcast services. That these interests influence MSOs' programming choices and result in self-serving favoritism irrespective of subscriber needs is openly acknowledged." Source: Petition for Reconsideration of Association of Independent Television Stations, Inc. in MM Docket No. 85-349 at 13 (Jan. 7, 1987); CR VOL. I.CC, EXH. 181, CR 16671.

219. The record indicated that: "Indeed, there are even greater incentives to discriminate against broadcast signals. With independently owned cable networks, the local cable operator has the ability to derive income from advertising on that network. Thus, while revenues would be maximized by favoring those services which are owned by the cable operator, carriage of an independent cable network is the second best economic choice due to the potential for advertising revenue. As applied to broadcasting, there is no potential for a second revenue

stream based on advertising. On the contrary, a cable operator may maximize its own advertising revenues by employment strategies that limit the audience of local broadcast stations." Source: Appendices to Testimony of James B. Hedlund, President, Association of Independent Television Stations, Inc. Before the Subcommittee on Telecommunications & Finance, Committee on Energy & Commerce, U.S. House of Representatives at 14-15 (May 16, 1990) (INTV, "Vertical Integration into the Cable Industry" (March 29, 1990)); CR VOL. I.M, EXH. 24, CR 09216-17.

220. The following information was in the record: "A.C. Nielsen studies show that viewership on cable networks can increase an average of 32% when a cable network is placed on cable channels 1 through 16. Therefore, repositioning broadcast stations to less favorable channel positions and substituting cable networks on these more desirable channels can have significant benefits for cable operators. Vertically integrated cable operators reap the benefit of increased viewership, and therefore increased advertising revenues for its upstream affiliate. Those operators which are not vertically integrated also benefit competitively by repositioning: their competitor for local advertising dollars will be watched by fewer viewers while revenues from local spot advertising for the cable system's own programming is increased." Source: Cable Television Regulation (Part 2): Attachments to NAB Testimony in Hearings Before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce, 101st Cong., 2d Sess., Appendix I at 1 (May 16, 1990) ("First Amendment Analysis on the Must Carry Statute," by P. Cameron Devore et al.); CR VOL. I.L, EXH. 22, CR 08831.

221. The record included the following: "A cable MSO has an incentive to direct its systems to delete (not add) one or more local independent stations, in order to increase network advertising revenue from any cable-only

networks in which the cable MSO has an equity position, when the MSO believes that:

* this will significantly increase the audience ratings of one or more of the cable networks they own, and

* the decline in subscription revenues from carrying fewer local independents will be more than offset by increased network cable advertising revenues."

Source: "Hearings on Competitive Problems" at 324 (Statement of Edward O. Fritts); CR VOL. I.H, EXH. 14, CR 05257.

222. Congress was also advised that: "For example, many vertically integrated cable companies deny potential competitors access to consumers and programming or overcharge for and restrict the use of programming that is made available. National Telecommunications and Information Administration (NTIA) data clearly demonstrate that American Television & Communications Corporation (ATC), the nation's second largest cable company, discriminates against its major rival Viacom by favoring the programming of its affiliates HBO, Cinemax, USA and Black Entertainment Network. Similarly, Viacom favors the programming of its affiliates over non-affiliates." Source: "Oversight Hearings" at 298 (Statement of Gene Kimmelman); CR VOL. I.F, EXH. 11, CR 03746.

223. The record indicated that: "In a recent study of programming, the NTIA argued that integration does not affect the programming available to subscribers. That conclusion is at odds with more rigorous analysis and, in fact, with the NTIA's own data. NTIA reached the wrong conclusion because its analysis included some rather small integrated systems and did not focus on the two different bases of market power we have identified or the multiple interconnects between groups of companies. The NTIA data show that Time Inc.'s affiliate,

ATC, clearly has discriminated against the programming of its major rival, Viacom (see Exhibit 3). ATC was more likely to be carried by its affiliates than non-affiliates. At the same time, ATC's affiliates were less likely to carry one of the three of Viacom's programs than non-affiliates. Viacom affiliates were more likely to carry two of its own three programs." Source: "Hearings on Cable TV Consumer Protection Act of 1989" at 77 (Statement of Gene Kimmelman); CR VOL. I.H, EXH. 14, CR 05010.

224. The record also included the following: "Finally, the record reveals that Manhattan Cable TV, Inc., a Time Warner system, repeatedly denied access to Showtime, a movie service owned by Viacom that is a direct competitor to Time's general subscription service, HBO. When Manhattan Cable expanded its channel capacity to create room for additional services, it agreed to carry Showtime, but later refused and instead added its own new pay service, Cinemax." Source: FCC Report, "In the Matter of Competition, Rate Deregulations and the Commission's Policies Relating to the Provision of Cable Television Service," MM Docket No. 89-600 ¶ 125 at 69 (July 31, 1990); CR VOL. I.L, EXH. 23, CR 09041.

225. The record included the following: "For example, many vertically integrated cable companies deny potential competitors access to consumers and programming or overcharge for and restrict the use of programming that is made available. National Telecommunications and Information Administration (NTIA) data clearly demonstrate that American Television & Communications Corporation (ATC), the nation's second largest cable company, discriminates against its major rival Viacom by favoring the programming of its affiliates HBO, Cinemaax, USA and Black Entertainment Network. Similarly, Viacom favors the programming of its affiliates over non-affiliates." Source: "Oversight Hearings" at 298 (Statement of Gene Kimmelman); CR VOL. I.F, EXH. 11, CR 03746.

226. Congress was also informed that: "Large MSOs may use their substantial economic powers to force cable programmers to provide popular programming exclusively to them in those few areas where the MSOs' confront some competition; likewise, they may deny access on their cable systems to unaffiliated programming sources. One study for example, demonstrated that Time Incorporated (now Time Warner), which owns HBO and Cinemax, is less likely to carry showtime and The Movie Channel on its cable systems, which are owned by Viacom, another MSO; similarly, Viacom, which owns Showtime and The Movie Channel, is less likely to offer HBO and Cinemax on its cable systems." Source: "Oversight Hearings" at 202 (Testimony of James Sharpe); CR VOL. I.F, EXH. 11, CR 03650.

227. Congress was also informed in the record that: "Large cable MSOs have also sought to extend their market power into program production and distribution. They have used this power to reduce competition from new technologies and to deny viewers program choice. For example, Time Inc. owns both cable systems and two pay cable movie services, HBO and Cinemax. Viacom is a large cable MSO which also owns two pay cable movie services, Showtime and The Movie Channel. More than 90 percent of the cable systems owned by Time Inc. carry HBO and 75 percent carry Cinemax. On the other hand, fewer than 60 percent of the Time Inc. cable systems carry Showtime and only 25 percent carry The Movie Channel." Source: Comments of the United States Telephone Association in MM Docket No. 89-600 at 23 (March 1, 1990) (Appendix 2); CR VOL. I.V, EXH. 112, CR 13308.

228. The record also indicated: "On the whole, vertically integrated cable networks are more widely carried than non-intergrated cable networks. Among 41 basic cable networks listed in the *Channels 1990 Field Guide* (at 78-79), 21 were those in which a cable MSO held

an equity or other ownership interest. The remaining 20 were not. Those in which an MSO held an interest had an average of 30,0328-571 subscribers versus 17,325,000 subscribers for those in which no MSO held an interest. . . . [L]ooking to the top 5, top 10, and top 15 cable networks in each category, the disparity between the average number of subscribers served is constant. Similarly, whereas 12 of the cable networks with MSO interests served 50% or more of the nation's cable households, only 5 of the networks with no MSO ownership reached 50% or more of the nation's cable subscribers." Source: Reply Comments of INTV in MM Docket No. 89-600 at 45-46 (April 2, 1990); CR VOL. I.X, EXH. 121, CR 14466-67.

Congress Was Also Aware That the CABLE Industry Had Alleged in Litigation That MSO's Strongly Favored Their Integrated Programmers

229. The record indicated that Viacom, one of the largest cable operators and programmers, had brought suit against a leading cable operator, alleging that "[t]o disadvantage pay services which compete with defendant HBO, Inc. and maintain and entrench HBO, Inc.'s monopoly power, defendant ATC has refused access on its cable systems to competing pay services, notably Showtime and The Movie Channel, or has provided access only on a discriminatory basis, injuring plaintiff SNI and consumers." Source: INTV Petition for Rulemaking and Supplemental Statement in Support of Petition for Notice of Inquiry, in MM Docket No. 89-600 at ¶ 37 (Oct. 23, 1989) (Exhibit 4); CR VOL. I.R, EXH. 90, CR 11650. *See also* "Hearings on Cable Television Regulation (Part I)" at 137 (Statement of Gene Kimmelman); CR VOL. I.G, EXH. 13, CR 04335.

230. Congress was also aware that Turner Broadcasting Systems, Inc.—a leading cable programmer and a plaintiff in this litigation—had made the following averments in *Cable News Network Inc. v. Satellite News Channels,* Civil Action File No. C83-430A (U.S.D.Ct., N.D. Ga.):

1. That cable operators maintain 'a monopoly of the market for the provision of cable television programming services to cable television subscribers within the geographic area covered by each franchise.' (Complaint at 16).

2. That cable operators exercise 'control over a facility that is essential to the provision of cable television programming services to cable television subscribers within the geographic area covered by each franchise.' (Ibid).

3. That cable operators can use their 'monopoly power' to give an 'affiliated entity' a 'competitive advantage' over other program services. (Complaint at 17).

4. That cable operators' monopoly power and vertical integration create 'substantial barriers' to entry by other programming services. (Complaint at 18).

5. That cable television subscribers 'have been and will continue to be adversely affected' by cable monopoly and vertical integration. (Complaint at 19).

Source: "Hearings on Competitive Problems" at 365 (Statement of Preston Padden); CR VOL. I.H, EXH. 14, CR 05298.

231. The record also included information about similar allegations by plaintiff USA Network in litigation against a leading multiple system operator, in *USA Network v. Jones Intercable, Inc.,* Civ. No. 6895, slip. op. (S.D.N.Y. Jan. 18, 1990): "Other examples of apparent favoritism toward carriage of services in which the operator has an equity interest have also been brought to our attention. For example, Jones Intercable ("Jones") removed the USA Network ("USA") from many of its

systems after USA sought to negotiate a rate increase, despite the fact that third party audience measurements showed that it was the most highly viewed service on those systems. Jones then deleted USA in favor of the proposed TNT programming service—a service in which Jones has an equity interest through its investment in TBS—even though TNT's rates were higher than those proposed by USA. USA ultimately obtained a summary judgment in a U.S. district court proceeding against Jones for breach of contract. When ruling in USA's favor, the district court stated that Jones' intentions with respect to USA 'appeared to be anything but benign.'" Source: FCC Report, "In the Matter of Competition, Rate Deregulations and the Commission's Policies Relating to the Provision of Cable Television Service," MM Docket No. 89-600 at ¶ 124 (July 31, 1990); CR VOL. I.L, EXH. 23, CR 09040-41.

232. Similarly, in the FCC proceedings, a leading MSO, Cablevision, made the following allegations about TCI's favoritism of an integrated programmer: "After negotiations to purchase an equity interest in Rainbow's regional sports services ended without a final agreement, TCI announced that its systems will not longer carry regional sports networks on their 'basic tiers'—although TCI-affiliated sports services such as WTBS and TNT would continue to be carried on 'basic.' While Cablevision strongly supports the view that no programmer should be able to mandate carriage as part of a particular package, it objects to the inclusion of operator-owned programming in a preferential 'basic' package while similar services offered by unaffiliated programmers are excluded." Sourse: Comments of Cablevision Systems Corp. in MM Docket No. 90-4 at 10 n.22 (April 6, 1990); CR VOL. IGG, EXH. 202, CR 18116.

Similarly, The Cable Industry Had Warned Congress That Telephone Companies Should not be Permitted to Provide Tele-

vision Services Over Telephone Wiring On the Ground That Telco's Could be Expected to Favor Vertically Integrated Services

233. The record included the following: "In an environment where the local exchange carrier owns not only the wires but also the products transmitted over those wires, a telco can discriminate against independent competitors in favor of its own subsidiaries. For example, a telco can deny an independent competitor access to the wires, provide inferior service, or force the competitor to spend more time and money achieving equivalent access, thereby giving the telephone company a competitive price advantage." Source: "Hearings on Cable Television Regulation" at 577 (Statement of Decker S. Anstrom); CR VOL. I.J, EXH. 18, CR 07582.

The Growing Importance of Advertising Revenues to Cable Networks—in addition to Advertising Revenue Obtained Directly by Operators—Provided a Further Incentive to Favor Vertically Integrated Programmers: By Carrying These Networks The Operator Would Increase this Revenue Stream; and the Operator Could Maximize This Revenue Stream by Moving These Cable Networks to the Most Favorable Channel Positions.

234. Congress was informed that: "Cable is also expanding rapidly into the advertising marketplace. In 1987, cable sold $963 million in advertising. This year, it is estimated cable will sell between $2 and $3 billion in advertising—more than double the amount just four years ago, and the Cable Adveritsing Bureau estimates that by the end of the decade cable ad revenues will soar to between $9 and $10 billion." Source: "Hearings on Cable Television Regulation" at 755 (Statement of Edward O. Fritts); CR VOL. I.J, EXH. 18, CR 07759.

235. The record demonstrated that: "In 1993, advertising will account for 14.7% of the industry's revenues, compared to 5% of the industry's revenues ten years earlier." Source: "Hearings on Cable Television Regulation" at 888 (Statement of James B. Hedlund); CR VOL. I.J, EXH. 18, CR 07892.

236. The record also indicated: "Advertising dollars spent on cable television have grown astronomically in recent years, from $815 billion spent in 1985, to $1.9 billion in 1989. By 1995, the figure is projected to reach $5 billion." Source: "Hearings on Cable Television Regulation" at 230 (Statement of Xavier L. Suarez); CR VOL. I.J., EXH. 18, CR 07236.

237. The following information was in the record: "Similarly, Prime Network's Executive Vice President, Mat Tinley, has emphasized the significance of advertising revenue to regional sports channels: 'We'd better get a lot better at selling advertising because that is what is going to drive the bottom line in future years.'" Source: Comments of the Association of Indepenudent Television Stations, Inc. in M.M. Docket No. 90-4 at 45 (Sept. 25, 1991) (citing *Cable World*, "What's In Store for Regional Sports-More Ad Dollars, Pay-per-view Exploration on tap in 90's," January 1, 1990, at 21); CR VOL. I.K, EXH. 21, CR 08366.

4. *Evidence From Both Broadcast And Cable Sources That Operators Were Already Favoring Cable Programmers In Which They Had Ownership Interests.*

238. The record included the following: "The economic impact of favorable channel positioning is beyond question. TCI's most recent placement of its new service "Encore" demonstrates this fact: The Encore deal will also usher in shuffles in channel lineups across the board at TCI. In 95% of TCI systems, Encore will be put on channel 14, seen as a favorable channel slot because of its proximity to the VHF band." Source: "Hearings on Cable Television Regulation" at 881 (Statement of James B. Hedlund) (citing *Cable World*, April 22, 1991 at 4); CR VOL. I.J, EXH. 18, CR 07885.

239. The record indicated as follows: "The following examples typify TCI's refusal to carry HSN on TCI's cable systems:

* In September 1987, TCI's cable system in Portland, Oregon and the nearby communities of Albany, Lebanon and Newberg, Oregon dropped HSN at the direction of TCI's corporate management and now carries QVC.

* The TCI system in Englewood, Colorado dropped HSN's satellite program in October 1987, and now blacks out HSN's UHF signal. The general manager of the TCI system has told HSN that he cannot carry HSN because it competes with TCI's home shopping program.

* TCI's cable system in Freemont, California does not carry HSN, but carries QVC. When approached by HSN on April 25, 1990. regarding a possible affiliation agreement, TCI's state manager for California informed HSN that there is 'no way' TCI could carry HSN due to TCI's affiliation with QVC and that TCI could carry HSN only if TCI had an equity interest in HSN.

* The TCI affiliates in Scottsdale, Arizona and Perryton and Corpus Christi, Texas have dropped HSN. The local managers of those systems have stated that, despite local preferences for HSN, TCI instructed them to drop HSN in favor of TCI's home shopping program. TCI also cancelled HSN's carriage arrangements with TCI systems in Pittsburgh, Pennsylvania and Kearney, Nebraska.

* In New York City, HSN has considerable success in obtaining carriage on the cable systems owned by Time-Warner/ATC, Cablevision and Paragon. By contrast, HSN is not carried on any part of the New York City cable system owned by TKR Cable, which is indirectly owned by TCI. Also, in June 1987, TKR dropped HSN from its cable system in Long Beach, New Jersey."

Source: "Hearings on Cable TV Consumer Protection Act of 1991" at 435-36 (Statement of Roy M. Speer); CR VOL. I.I, EXH. 17, CR 06893-94.

240. The record also indicated: "A vertically integrated cable company such as TCI owns both the programming and the distribution system. As a result of this vertical integration, HSN has been singularly unsuccessful in securing or maintaining carriage for either its cable or broadcast programming on TCI owned or controlled cable systems. TCI systematically refuses to carry HSN1 or HSN broadcast affiliates on its cable systems opting instead to carry QVC. TCI's ownership interest in QVC is the reason TCI refuses to initiate, renew or extend HSN's affiliaiton agreements with cable systems owned or purchased by TCI." Source: "Hearing on Cable TV Consumer Proteciton Act of 1991" at 434-35 (Statement of Roy M. Speer); CR VOL. I.I, EXH. 17, CR 06892-93.

241. The record indicated that: "United [Cable Television Corp.] has eight to 10 services it wants to place in better channel positions, including what Mr. Kovacs termed Unitel 'must-carries'—services in which United has an equity position, including The Discovery Channel, the Preview Network and Cable Value Network." *Multichannel News,* "Channel Realignments: United Cable Eyes Plan to Bump Network Affils to Upper Channels; TCI Unit Will Cluster Independents," Nov. 3, 1986, p. 39, included in Source: "Hearings on Competitive Issues" at 658 (citing Nimrod Kovacs, United Marketing and

Programming Vice President, United Cable Television Corp.); CR VOL. I.C, EXH. 8, CR 01997.

242. The following was in the record: "In late 1986, the world's largest cable company, TCI, notified us that we would be moved from Channel 12 to different, higher channels on their six Bay Area systems. By January 1986 we were moved on all six of these systems. On five of the six systems TCI's owned Discovery Channel took our place. TCI owns a substantial equity interest in this cable programming and also derives advertising revenue from the commercials sold in the program. This move was contrary to demonstrable viewer preference and TCI admitted to throwing out more than 90 percent of the results of its own 'consumer survey' on what viewers wanted regarding channel placement." Source: "Hearings on Competitive Issues" at 707 (Memorandum Re: Joint Comments of the Monopoly of Cable Television Systems and the Demise of Independent Free Television, (March 17, 1988)); CR VOL. I.C, EXH. 8, CR 02046.

243. The record also indicated that: "In January 1989, the TCI system in Millbrae, California, moved three local independent stations out of the VHF band and replaced them with three cable program services (CNN, American Movie Classics and the Discovery Channel) in which TCI holds substantial equity interest and in which TCI sells advertising availabilities. The stations received no notice of the shifts, which occurred just three days prior to the start of the critical February Nielsen and Arbitron rating period. *One of the three stations commissioned an independent professional survey that showed that 20% of Millbrea cable households with 'second' TV sets, who could formerly receive the station on those second sets, are no longer able ot do so because of the channel shifts.*" Source: "Hearings on Cable Television Regulation" at 878-79 (Statement of James B. Hedlund); CR VOL. I.J, EXH. 18, CR 07882-83.

244. The record indicated that: "In December, 1988 KICU-TV San Francisco, was shifted off of channel 6 to make room for a cable barker channel promoting the system operator's proprietary pay-per-view service." Source: "Hearings on Cable Television Regulation" at 878 (Statement of James B. Hedlund); CR VOL. I.J, EXH. 18, CR 07882.

245. The record also indicated that: "The economic impact of favorable channel positioning is beyond question. TCI's most recent placement of its new service "Encore" demonstrates this fact: The Encore deal will also usher in shuffles in channel lineups across the board at TCI. In 95% of TCI systems, Encore will be put on channel 14, seen as a favorable channel slot because of its proximity to the VHF band." Source: "Hearings on Cable Television Regulation" at 881 (Statement of James B. Hedlund) (citing *Cable World*, April 22, 1991 at 4); CR VOL. I.J, EXH. 18, CR 07885.

246. The following information was in the record: "INTV conducted its own unscientific study of 70 instances of channel shifting on TCI cable systems as reported to our Association. In 65 of those 70 instances, the original channel position of the local station was subsequently filled with a program service in which TCI had an equity interest." Source: "Hearings on Cable Television Regulation" at 878 (Statement of James B. Hedlund); CR VOL. I.J, EXH. 18, CR 07882.

247. The record indicated that: "Other TCI cable systems in Iowa and elsewhere made similarly arbitrary changes in their television station carriage. And what was the reason for these changes? To make room for cable programming services, such as Encore and TNT in which TCI has a financial interest." Source: "Hearings on Cable Television Regulation" at 758 (Statement of Edward O. Fritts); CR VOL. I.J, EXH. 18, CR 07762.

248. The record indicated: "Another example involves the Kansas City market. ATC is the biggest and most important cable system in Kansas City, Missouri. In October of 1988, it embarked on a policy of channel shifting that confused the public and prevented signals from reaching many viewers. For whatever reasons, ATC repositioned *all* local broadcast stations in Kansas City. The three VHF network affiliates were all moved off-channel after years of being carried on-channel. KSHB-TV, Ch. 41, which for years had been carried on channel 3, was moved to channel 33. The local Kansas City stations were moved around to make room for cable program service on which ATC sold advertising and had an ownership interest." Source: "Hearings on Cable Television Regulation" at 879 (Statement of James B. Hedlund); CR VOL. I.J, EXH. 18, CR 07883.

249. The record included the following news report:

> "But the postponement of a takeover of Group W Cable by Telecommunications Inc. (TCI), the nation's largest cable company, may be just a stay of execution for Channels 11, 12 and 13, which under TCI's proposal would soon go spinning off their designated VHF spots on the dials of Group W cable customers and into the upper reaches of the less accessible and less profitable UHF range. Channels 2-13 VHF (very high frequency) have the strongest signals, are the most easily accessible on standard TV sets and are the stations most often watched. Naturally, advertisers favor those stations. Under TCI's plan, KSTW (Channel 11) would be shifted to Channel 23, KCPQ (Channel 13) would appear on Channel 24, and Bellingham's KVOS (Channel 12) would be placed on Channel 32. KTPS (Channel 28), Tacoma's public-TV station, would be dropped entirely and stands to lose the 34 percent of its subscribers who live in the Seattle area. Several of the most desirable lower-numbered spots

would be given to programming favored by the cable conglomerate. The Cable News Network would be on Channel 3, American Movie Clasics (a new movie service) would be on Channel 6, Lifetime cable would be on Channel 8, ESPN sports would be on Channel 10, Disney would be on Channel 12, Nickelodeon would be on Channel 13, The Weather Channel would be on Channel 14 and a cable shopping program would be on Channel 15. TCI spokesman Curtis Speck, general manager of Seattle's Group W, admitted that TCI owns stock in CNN, American Movie Classics, The Weather Channel, the shopping service, Discovery Channel (which would be on Channel 33) and the Black Entertainment Network (which would share space with other shows on Channel 34)."

Source: *The Seattle Post,* Dec. 4, 1986, included in "Hearings on Competitive Issues" at 663; CR VOL. I.C, EXH. 8, CR 02002.

250. The record also included the following: "WHKE is licensed to Kenosha, Wisconsin, which is located between Milwaukee and Chicago. It is considered part of the Milwaukee ADI. WHKE commenced broadcast operations on June 1, 1988, and is not carried on any cable systems. A. C. Nielsen estimates that of the approximate 773,000 television households in the Milwaukee ADI, 52% (398,000) subscribe to cable. Despite serving as the only television station licensed to Kenosha, with a population of approximately 124,000 the Kenosha cable system (Jones Spacelink) refuses to carry WHKE. LeSEA began discussions with Jones seeking carriage of WHKE on the Kenosha system prior to commencing broadcast operations. Jones has steadfastly refused to carry WHKE. The Kenosha system has responded to LeSEA stating that it is not in the business of helping other competing businesses get started, that the system has to put on those program services which it considers are most profitable,

and that it can make more money carrying a satellite service. The system carries VISN, a satellite delivered religious program service in which Jones has a financial interest, and which competes directly with WHKE's religious programming. The cable system also competes with WHKE in broadcasts of local high school sports events. The cable system also carries Mind Extension University, which Jones owns, and which competed with broadcasts of college classes from Gateway Technical College, the Wisconsin technical school system, which WHKE previously broadcast. The other cable systems in WHKE's service area have offered similar and other reasons for not carrying WHKE, including their unwillingness to carry the station when it is not carried on the Kenosha system, that WHKE would compete with them, and that their system is full, despite having dropped and added services since WHKE signed on." Source: Comments of LeSEA Broadcasting Corporation, in MM Docket No. 90-4 at 8-9 (Sept. 25, 1991); CR VOL. I.P, EXH. 65, CR 10836-37.

251. The record included the following: "KWHB, like the other LeSEA stations, offers a mix of family entertainment, religious, and locally produced programs, including a weekly public affairs program, weekly religious programs, and local high school football and basketball games including the state championship playoffs. The cable system carries its own paid religious channel and also provides some local origination of high school sports, both of which compete with KWHB. Although the Tulsa system now carries KWHB for 12.5 hours per week, it has specifically excluded KWHB's religious and local sports programs which offer direct competition to the cable system." Source: Comments of LeSEA Broadcasting Corporation, in MM Docket No. 90-4 at 14 (Sept. 25, 1991); CR VOL. I.P, EXH. 65, CR 10842.

252. The record included the following: "When cable giant TCI bought a major portion of Group W's cable interests, one of the plums was the huge Group W

system serving Seattle. In October of 1986, even before it had taken formal control of that system, TCI announced its plans to shuffle channel alignments. TCI's plan was to move Seattle Independents KSTW and KCPQ from the cable channels they had always occuiped (channels 11 and 13 respectively, corresponding to their over-the-air channel numbers) to new positions in time 20's. From TCI's perspective, these moves (as well as the dropping of a public station) were necessary to make room in the prime channel positions for American Movie Cassics, Discovery Channel and a home shopping service, Cable Value Network. TCI just happens to be an equity owner in all three of these services, and obviously felt they would benefit financially by relocating the Independents to the cable channel 'Siberia' while substituting their own services. Unfortunately for TCI, this channel shift was announced before the Seattle City Council had formally ratified the transfer in ownership from Group W to TCI. The resulting uproar, brought on by the Independents, the public stations and angry consumers, convinced the Council to delay ratification of the transfer. This, in turn, caused TCI to agree to suspend —for the 'time being'—the Independent channel shifts. In a revealing comment about the dispute, TCI Vice President for Western Operations, Barry Marshall, stated: 'I'm sorry if they're (broadcasters) pissed off . . . Goddam it, it's my cable system, and I paid millions to build the plant. I get mad when they try to tell me how I can run my store.'" Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 7 (Sept. 25, 1991) ("Free Television Under Siege," INTV (May 1988) (citing *Multichannel News,* Nov. 3, 1986); CR VOL. I.K, EXH. 21. CR 08561.

253. The record indicated: "Independent WUTV has served the Buffalo market for 18 years. Since its inception the station had been carried on channel #7 on the Buffalo cable system—the principal cable system in the

entire ADI. Then, abruptly, TCI moved WUTV to cable #22 (not the station's off-air channel #29!) and replaced the local station with American Movie Classics—a TCI-owned service. In its new position, WUTV can only be seen by consumers with cable-ready TV sets or those willing to rent a converter from TCI. TCI also moved the local public station out of the first twelve channels. A jointly-orchestrated public campaign was mounted to have both local stations returned to their original positions. Finally, TCI consented to the return of the public station to its original position, but continued to stonewall on WUTV—the only local station not to be carried on the lowest level of the basic tier." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 30 (Sept. 25, 1991) ("Free Television Under Seige," INTV (May 1988) (citing *Multichannel News,* Nov. 3, 1986); CR VOL. I.K, EXH. 21. CR 08584.

254. The record included the following: "In late November, 1986, TCI notified the San Francisco area Independent stations of its plans to shift their channel locations. TCI claimed its move was based on a 'comprehensive survey of subscriber attitudes' and was intended to 'provide the most popular services on the first twelve cable channels.' KTVU—which broadcasts on channel #2—and KBHK—which broadcasts on channel #44 but has been carried on cable channel #12 for over 20 years—were to be repositioned in the upper end of the cable dial. Other Bay area Independents were to suffer a similar fate. Even though KTVU and KBHK are the highly-rated #1 and #2 Independents in this, the 4th largest television market in the country, TCI planned to move them out of the first twelve cable channels. In their place TCI planned to substitute cable services on which it sold advertising and—in several instances —in which TCI held an ownership position. Although TCI temporarily postponed the relocation of KTVU, it nonetheless went ahead with the shift of KBHK. TCI,

incidentally, does not provide free converters for additional set hook-ups, meaning that KBHK is *not* available on thousands of sets hooked to TCI's cables." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 9 (Sept. 25, 1991) ("Free Television Under Siege," INVT (May 1988) (citing *Multichannel News*, Nov. 3, 1986); CR VOL. I.K, EXH. 21. CR 08563.

255. The record indicated that: "When it signed on October 1985, KOOG became only the second Independent station in the entire Salt Lake City market. Despite a very respectable program schedule, the station was unable to achieve *any* cable carriage whatsoever. Virtually all of the cable systems within 50 miles of Ogden are owned by TCI. During this period, TCI President John Malone was quoted in the press as having advised financial analysts of his plans to create regional cable channels that would resemble Independent television stations. Dr. Malone was further quoted as stating that his new cable channels would be most effecitve in those regions where multiple over-the-air Independents were *not* well established. He specifically cited the Rocky Mountain States as one such region. Thus, TCI's absolute refusal to carry KOOG had the appearance of anti-competitive behavior. KOOG's owners and INTV spent a year begging and cajoling TCI to give the station a chance. TCI finally put KOOG on its Ogden system but refused to add it to any of its big Salt Lake City area systems. Because the station was locked out of almost all the cable homes in its market, its ratings were poor and it was unable to meet the payment on its programming contracts. As a result, KOOG affiliated with Home Shopping Network for part of each day just to keep the lights on. TCI, which owns a competing home shopping service, then used their format change as a new excuse to deny KOOG carriage." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 4 (Sept. 25, 1991) ("Free Television Under

Siege," INTV (May 1988) (citing *Multichannel News*, Nov. 3, 1986); CR VOL. I.K, EXH. 21, CR 08557.

256. The record also included information that WPLG, in Miami, Florida had been "replaced on a Comcast system by [a] QVC Home Shopping channel in which Comcast has a financial interest." Source: Reply Comments of the National Association of Broadcasters, in MM Docket No. 88-138 at 3 (Aug. 8, 1988); CR VOL. I.Z, EXH. 143, CR 15364.

5. *Evidence That Increasing Horizontal Concentration And Gatekeeper Control Over Cable Households Gives Large Cable Operators Market Power To: (A) Continue To Insist That Cable Services Provide Equity Interests; (B) Extract Very Favorable Terms For Carrying Cable Programming; And (C) Preclude Services That The Operators Viewed As "Competition" From Gaining Access To Cable Households.*

257. The record indicated: "Not only do these mega-MSOs have the power to destroy a program service, but they can exercise that power at little or no cost. At the present time, there is plethora of satellite-delivered program services, but a dearth of channel capacity on most systems. As a result, most cable systems are free to replace program services at will, as there is always a substitute waiting in the wings. Indeed, things have gotten so bad that, according to *Broadcasting* magazine's November 23, 1987 issue, 'in the past 18 months, cable operator ownership and equity participation—the foot-soldiers of vertical integration—have rapidly become the quid pro quo for launchnig new services.'" Source: "Hearings on Competitive Issues" at 395-96 (Statement of Mark Foster); CR VOL. I.C, EXH. 8, CR 01734-35.

258. The record also demonstrated that: "Without such limitations, cable MSO's can wield enormous market

power. They can broker better deals for programming by providing more homes to potential buyers, but they can also exercise power to deny access to several or multiple markets. In fact, this horizontal integration drives the cable industry to become more vertically integrated, as MSO's force programmers to allow them to buy into cable programming in order to agree to be a distributor of that programming." Source: "Hearings on Cable Television Regulation (Part 2)" at 109 (Statement of Thomas L. Goodgame); CR VOL. I.I, EXH. 16, CR 06276.

259. The record included the following: "TCI has followed a strategy of first dominating the cable operators market and then expanding backward into programming. It doubled its market share after deregulation through acquisitions. 'TCI and other operators are big shots in their franchise areas because theirs is usually the only game in town. Operators don't have direct competition, and they have been able to set their own rates since January, when the industry was deregulated. Operators own the hardware— cable and overhead wire—that feeds the software, or programs, to subscribers' homes. An operator can break a local low rate station, especially a public or independent broadcaster, by refusing to carry its programs. Local subscribers see only the national services operators choose to buy, such as Univision, Inc. programs, kid's shows on Nickelodeon, the Black Entertainment Television Network, or Arts & Entertainment Network. But Malone is more formidable than any other cable operator because it's virtually impossible to make money from a cable network without TCI's 8 million subscribers. Indeed, Malone's support has launched fledgling networks, and his opposition has kept other[s] from getting off the ground.'" Source: "Hearings on Cable TV Consumer Protection Act of 1989" at 68-69 (Statement of Gene Kimmelman) (quoting "The King of Cable," Business Week, Oct. 27, 1987, p. 111); CR VOL. I.H., EXH. 14, CR 05001-02.

260. The record indicated: "One example of MSOs' ability to curtail programming services directly competing with their vertically owned programming services involves the attempt of NBC and Cablevision to launch the Consumer News and Business Channel (CNBC). In testimony before the Senate Commerce Committee last year, NBC chairman Bob Wright testified that a number of large MSOs insisted as a condition of carriage that CNBC not become a general news service in direct competition with CNN, which is owned in part by TCI, Time Warner, Viacom and others MSOs. The Commission has obtained copies of typical CNBC carriage contracts which confirm that MSOs have secured this concession from the cable network. The contracts contain a general description of the service to be provided but also stipulate that '[i]t is understood and agreed that it is not the intent of [CNBC] to allow [the service] to become, and the CNBC Service or no segment thereof shall become a general news service covering events unrelated to [business, financial, consumer and other specified news events].'" Source: FCC Report, "In the Matter of Competition, Rate Deregulations and the Commission's Policies Relating to the Provision of Cable Television Service," MM Docket No. 89-600 ¶ 120 at 67; CR VOL. I.L., EXH. 23, CR 09039.

261. The following information was in the record: "The large cable operators like Time-Warner and TCI are heavily vertically integrated in programming operations. When such an operator, which has close ownership and operation links with CNN is approached for channel capacity for a competing news service by NBC, it is only human nature to be strongly influenced in its decision by the above described links. There are, and have been, pending antitrust suits alleging the difficulties which competitors have to gain access to MSO cable systems, or in the case of competing services like MMDS or TVRO, to the cable programming services owned in whole or in part by the cable MSOs. These difficulties will grow as the trend to vertical integration continues apace." Source:

Comments of Action for Children's Television in MM Docket No. 89-600 at 6 (March 1, 1990); CR VOL. I.T., EXH. 106, CR 12497.

262. The record included the following: "As *Broadcasting* has aptly noted 'cable operator ownership and equity participation—the foot soldiers of vertical integration—have rapidly become the quid pro quo for launching new services.' 'Vertical Integration,' Broadcasting at 40 (Nov. 23, 1987). Simply stated, potential programmers are forced 'to offer equity stakes to operators to insure carriage.' Id. Given that TCI is sufficiently large to, in the words of one Showtime executive, 'make or break' a new network, it is not surprising that the backers of virtually every new programming service to debut of late have felt compelled to provide equity interests to TCI in order to assure carriage." Source: Comments of the Wireless Cable Association, Inc. in MM Docket No. 89-600 at 46-47, n.94 (March 1, 1990) (also citing "The Cable Network Programming Universe," *Broadcasting*, at 40 (May 30, 1988)); "Cable Operators Make The Equity Play," *Broadcasting*, at 66 (Nov. 23, 1987); CR VOL. I.T, EXH. 102, CR 12110-11.

263. The record included the following: "Similarly, when National Broadcasting Company ('NBC') was considering the initiation of a news service to compete with CNN, TCI initially supported NBC's plans. However, after CNN made significant price concessions to TCI, TCI announced that it would not carry the planned NBC service. 'Without a commitment from Tele-Communications, NBC was unable to get the subscribers needed to proceed with a competing network.'" Source: Comments of the Wireless Cable Association, Inc. in MM Docket No. 89-600 at 46 n.92 (March 1, 1990); CR VOL. I.T, EXH. 102, CR 12110.

264. The record included the following: "As one programming executive complained about his dealings with TCI: '[w]e always had to back down. It's a simple

equation. Without TCI no program channel can survive. Period. They enjoy a feared position in the industry. They are bullies.'" Source: Comments of the Wireless Cable Association, Inc. in MM Docket No. 89-600 at 46 n.92 (March 1, 1990) (quoting *Newsweek*, "Cable's Biggest Leaguer," June 1, 1988, at 40); CR VOL. I.T, EXH. 102, CR 12110.

265. The record indicated that: "The largest cable operators, like TCI and ATC, control access to such a large segment of the viewing public that they can extract concessions (*i.e.*, exercise monopsony power) from programmers who desperately need to reach a large audience to cover their programming costs." Source: "Hearings on Cable Television Regulation (Part I)" at 139 (Statement of Gene Kimmelman); CR VOL. I.G, EXH. 13, CR 04337.

266. The following information was in the record: "NITA data also shows that the nation's largest multiple system operator (MSO), which controls access to the largest viewing audience, Tele-Communications Inc. (TCI), exercises its market power over programmers by limiting programmers' access to TCI subscribers (*i.e.*, TCI offers fewer programs to its subscribers than smaller cable operators, saving on the cost of programming, increasing profits and leveraging programmers into preferential arrangements for TCI)." Source: "Hearings on Cable Television Regulation (Part I)" at 136 (Statement of Gene Kimmelman); CR VOL. I.G, EXH. 13, CR 04334.

267. The record also included the following: "New programmers not owned by the cable giants face an uphill battle getting carriage on cable systems. The SCI-FI channel is but one example. This programmer has offered to provide its programming to any cable system that agrees to carry it at NO CHARGE for two years with equity ownership of the channel." Source: "Hearings on Cable TV Consumer Protection Act of 1991" at 404 (Statement of Richard Gamberg); CR VOL. I.I, EXH. 17, CR 06862.

C. Evidence Of Further Incentives To Deny Carriage Or Otherwise Act Adversely To Local Broadcast Stations.

1. *Competition For Viewers.*

268. The record included the following: "As Comcast's president trenchantly observed, '[y]ou probably only need four broadcast stations below (channel) 13 . . . We'd rather viewers migrate to cable. To get such lineups, [we] expect to drop former must carries . . . [We] have already axed 10-12 stations.'" Source: Cable Television Regulation (Part 2): Attachments to NAB Testimony in Hearings Before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce, 101st Cong., 2d Sess. at 33 (May 16, 1990) (NAB Reply Comments to FCC in the Matter of Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, MM Docket No. 89-600 (April 2, 1990)) (citing *Multichannel News,* September 8, 1986, "Cable Operators Begin To Shufflle Channel Lineups."); CR VOL. I.L, EXH. 22, CR 08884.

269. The record also includes: "United [Cable] was concerned enough about broadcasters' reaction to label it [*i.e.,* United's plan to reposition certain broadcast stations on higher channels] a 'trial balloon,' but Mr. Kovacs said, [the broadcasters' reaction] depends on how it's being done. The stations might bitch about it, but conceptually our job is to promote cable television, not broadcast television." (Nimrod Kovacs, United Marketing and Programming Vice President). Source: "Hearings on Competitive Issues" at 658 (*Multichannel News,* "Channel Realignments: United Cable Eyes Plan to Bump Network Affils to Upper Channels; TCI Unit Will Cluster Independents," Nov. 3, 1986, p. 39); CR VOL. I.C, EXH. 8, CR 01997.

270. The record indicated that: "It is no accident, morever, that independent stations are most often the target of these practices. Independents, with their mixture of off-network and first-run syndicated programs, movies and sports, are the closest substitute for many of the cable program services that cable operators want to promote. The cable operator thus has a financial incentive to harm local independents, *even though subscribers prefer the disadvantaged broadcast service to the cable services which the system favors.*" Source: Comments of Chris-Craft Industries, Inc. in MM Docket No. 90-4 at 7 (Sept. 25, 1991); CR VOL. I.Q, EXH. 74, CR 11236.

271. The following information was in the record: "One of the first companies to begin this channel-shifting process was Heritage Communications, which months ago reconfigured lineups in Dallas and Des Moines and is now dedicated to making such changes 'wherever the opportunity presents itself,' said Jim Braun, program manager. Such changes are not being effected in other major Heritage systems, including south Texas and South Bend, IN, he added. Heritage had identified what it called a 'core four package' of cable services it would like to put on the V-band (channels 2-13) of systems: CNN, ESPN, MTV: Music Television and USA Network. Moving these services to lower-numbers channels and near broadcast affiliates, Mr. Braun said, will increase spot viewing of the services, leading to increased cable viewing overall and to an increased perception of value in cable by the subscriber." Source: "Hearings on Competitive Issues" at 659 (*Multichannel News,* Sept. 8, 1986); CR VOL. I.C, EXH. 8, CR 01998.

272. The record indicated that: "'We fundamentally believe the business we'll be in, in the next five years, is selling cable product,' concurred Brian Roberts, Comcast Cable vice president of operators. By 1990 or 1992, he said, 'We could be charging $20 for basic, and subscribers will want product worth that much.' That product, he said, should be cable product, 'MTV and VH1' more than independents, which he said had been proliferating

since cable offered them distribution. 'Shouldn't we give more, and good, shelf space to cable? Why have people trained to view UHF?' Mr. Roberts asked." Source: "Hearings on Competitive Issues" at 661 (*Multichannel News,* Sept. 8, 1986); CR VOL. I.C, EXH. 8, CR 02000.

273. The record also indicated that: "Comsat, according to president and chief executive officer Robert Clasen, has seven to eight basic services it would like to see on lower bandwidths, nearer broadcast affiliates. 'You probably only need four broadcast stations below (channel) 13,' Mr. Clasen said, adding, 'We'd rather viewers migrate to cable.' " To get such lineups, Comsat expects to drop former must-carried, depending on how the rules are finally structured, according to Mr. Clasen, who noted his system had already axed 10-12 stations. Comcast is now reviewing channel lineups on all its systems as part of its budget process; Mr. Clasen said half to 70 percent of the operator's systems would have significant' channel realignments in the coming year. 'We view this as an opportunity to come back and resell the product,' he stressed." Source: "Hearings on Competitive Issues" at 661 (*Multichannel News,* Sept. 8, 1986); CR VOL. I.C, EXH. 8, CR 02000.

274. The record indicated that: "As the programs provided by national cable program services have become more similar to the syndicated programming provided by an average over-the-air independent television station, cable operators are likely to view continued carriage of some local independent stations as of marginal value to the cable channel mix. Unless these local independents are able to secure funding to provide syndicated programming which is sufficiently different from both the programming provided by national cable program services (from which local cable companies can derive advertising revenues) and from imported superstations, many of these independents face relocation (from channels 2 through 13 or their on-air channel number) or deletion from

cable." Source: "Hearings on Competitive Problems" at 331-32 (Statement of Edward O. Fritts); CR VOL. I.H, EXH. 14, CR 05264-65.

275. The record included the following: "In addition to the competition concerning advertising, there is the more general competition that WLIG provides as a free, over-the-air alternative to cable. Just as cable penetration is generally highest where there are the fewest over-the-air signals, so are the Long Island cable operators better off if WLIG does not exist. This gives the cable operators every incentive either not to carry the station or to carry it in a manner that reduces its audience. It is asking too much of cable operators to think that they will identify with the public interest benefits of free over-the-air broadcast service to Long Island." Source: Comments of WLIG in MM Docket No. 85-349 at 20 (Jan. 29, 1986); CR VOL. I.AA, EXH. 155, CR 15694.

276. The record indicated that: "Specific examples of off-network syndicated product being cablecast by national cable programmers include: Cagney and Lacy, Falcon Crest, MacGruder & Loud, Jack & Mike (Lifetime) and Murder She Wrote, Miami Vice, Riptide, Mike Hammer, Petrocelli, That Girl, Dragnet (USA). Additionally, USA Network cablecasts first-run syndicated product which is very similar to that provided by an independent station: sports (WWF Prime Time Wrestling, etc.), game shows (Tic Tac Dough, etc.) and soaps (Edge of Night, etc.). Movies are also becoming an increasingly important part of the program mix on both USA and Lifetime. Likewise, off-cable programming, such as Gary Shandling, Double Dare, Bizarre, etc., is being picked-up by over-the-air stations. Therefore, it is clear that the broadcast television program marketplace and the cable television program marketplace are increasingly non-distinguishable, particularly for independent television stations. Often, the only distinction between the programming on cable network channels and independent station programming is the programs aired by

independent stations to comply with the public interest requirements mandated by federal law. Notwithstanding, the lack of differentiation between the local independent stations' syndicated programming and national cable program services will make continued carriage of at least some local independent stations increasingly unattractive to cable operators." Source: "Hearings on Competitive Problems" at 332 (Statement of Edward O. Fritts); CR VOL. I.H, EXH. 14, CR 05265.

277. The following information was in the record: "There is an obvious explanation for TCI's behavior. TCI has announced plans to begin its own, cable-exclusive programming service which would '. . . resemble an Independent television system.' TCI Chairman John Malone has stated that such channels would be the more successful in '. . . particularly undeserved areas such as the Rocky Mountain region which does not have many Independents.' Given this objective, it is no wonder why TCI had little interest in seeing a new Independent take root in the Rocky Mountain market of Salt Lake City." Source: INTV Statement in Support of Petition for Rule Making in RM 5475 (consolidated into MM Docket No. 89-600) at 10 (July 21, 1986); CR VOL. I.S, EXH. 97, CR 11877.

2. *National Carriage ("Affiliation") Agreements With Cable Programmers Provide Incentives To Favor These Programmers Regardless Of Their Popularity In a Given Community. These affiliation agreements provided incentives such as more favorable rates for carrying more than one programming service offered by the programmer, or lower rates for favorable channel positioning.*

278. The record indicated: "Second, cable network providers have begun offering bundles of networks to carriers and systems operators. In such a system, Turner

Broadcasting System can offer WTBS, TNT, Cable News Network, and CNN Headline News at rates that induce system operators to select the package because it is less expensive than finding separate cable networks to fill their channels. This practice borders on block booking and deserves significant attention because it harms diversity by reducing the opportunity for fledgling cable networks to gain channels on which to be carried. The practice also reduces the ability of local system operators to negotiate reasonable prices for individual services outside the bundle." Source: "Hearings on Cable Television Regulation (Part 2)" at 263 (Statement of Robert G. Picard); CR VOL. I.I, EXH. 16, CR 06429.

279. The record included the following information from *Multichannel News*, May 13, 1991, at 16, indicating that in TCI's efforts to open up space for Encore, " 'Turner Broadcasting [S]ystem Inc. . . . and MTV network on a multichannel network discount and are . . . unlikely to be pulled.' " Source: "Hearings on Cable Television Regulation" at 870 (Statement of James B. Hedlund); CR VOL. I.J, EXH. 18, CR 07874.

280. The record indicated that: "Although horizontal integration brings efficiencies to a firm's operations that result in scale economies in the cable industry, such integration harms the public interest by promoting homogeneity among the cable services offered by firms that operate multiple systems. Such firms, especially large firms such as Tele-Communications, Inc. (TCI), American Television and Communication, and Continental Cablevision, can negotiate for services on all their systems simultaneously and thus provide standardized fare to their audiences. This type of programming practice harms the general goal of diversity and gives the largest firms excessive power in determining what cable networks or services will be established or survive." Source: "Hearings on Cable Television Regulation (Part 2)" at 260 (Statement of Robert G. Picard); CR VOL. I.I, EXH. 16, CR 06427.

281. The record also indicated: "Moreover, several nonbroadcast cable program services recently have introduced 'sweeteners' in their arrangements with cable system affiliates, wherein the program service offers discounts and other compensation such as additional advertising spots to the cable operators in return for cable channel placements on the most-viewed 'lower 12' cable channels (2-13), which arrangement requires 'bumping' local broadcast stations to less desirable higher channels." Source: Petition for Reconsideration of Association of Independent Television Stations, Inc. in MM Docket No. 85-349 at 13 (Jan. 7, 1987); CR VOL. I.CC, EXH. 181, CR 16671.

282. The following information was in the record: "Among the cable networks offering such discounts of payments [for channel positioning] are ESPN, MTV, Lifetime Cable Network, and the three cable services offered by Turner Broadcasting Service (Cable News Network, Headline News, and 'superstation' WTBS). *See Electronic Media*, December 15, 1986 at p.4 and Nov. 17, 1986 at p.6; *Multichannel News*, Oct. 20, 1986, at p. 28A." Source: Petition for Reconsideration of Association of Independent Television Stations, Inc. in MM Docket No. 85-349 at 13-14, n.11 (Jan. 7, 1987); CR VOL. I.CC, EXH. 181, CR 16671-72.

283. The record also indicates the following: "The Committee is aware that certain cable programmers offer cable systems financial incentives to be placed on a lower channel number where viewers initially 'graze' in search of an attractive program." Source: "1992 House Report" at 55; CR VOL. I.A, EXH. 4, CR 00434.

3. *Incentives To Deny Carriage To Disfavor Broadcast Stations In Order To Promote Subscription To Premium Tiers.*

284. The record indicated that: "Independent television stations are in the worst position to effect a favorable carriage arrangement with their local cable system. This occurs [among other reasons] . . . because there appears to be a negative relationship between the number of independents carried by a cable system and premium service penetration." Source: "Hearings on Competitive Problems" at 322 (Statement of Edward O. Fritts); CR VOL. I.H, EXH. 14, CR 05255.

285. The record also indicated that: "Because of the hilly terrain, it is virtually impossible for West Virginia residents to receive broadcasts over-the-air. Cable television not only provide television to remote locations otherwise lacking television service but also corrects the inferior reception suffered by UHF stations, such as WVAH-TV, and establishes a technical parity between UHF and VHF transmissions. The most recent figures available indicate 62% cable penetration state-wide, while certain parts of the Channel 23 service area have cable penetration exceeding 90%. . . . From our start-up we have achieved carriage on cable systems throughout our service area. This achievement has, however, entailed repeated requests for relief from the FCC. Indeed, over the last three years, WVAH-TV has opposed numerous special relief petitions and expended thousands of dollars to obtain cable carriage. Given the mountainous terrain and general difficulty of receiving broadcast signals over the air, a prerequisite to broadcast existence in West Virginia is access to cable systems. Had the must-carry rules not existed in early 1980, I doubt sincerely that we would have attempted to put WVAH-TV on the air. . . . Even before the *Quincy* decision was released, cable systems serving the Charleston area began to carry WVAH-TV on an upper tier for which a converted is required rather than putting us in their lower-priced basic service. . . . In so positioning our station, the cable operator [Beckley Telecable System] made it clear to us, months before the *Quincy* decistion, that it would not carry WVAH-TV on its basic tier because viewers would then have no incentive to purchase its 'pay tier' statellite serv-

ices (*e.g.*, ESPN and HBO) which offered similar programs but at an extra cost." Source: Comments of the Motion Picture Association of America, Inc. in MM Docket No. 85-349 at ¶¶ 2,3,7,11 (Jan. 9, 1986) (Affidavit of Gary Dreispul); CR VOL. I.AA, EXH. 151, CR 15606-09. *See also* Comments of Meridian Communications Corporation on Notice of Inquiry and Notice of Proposed Rulemaking, MM Docket No. 85-349 at 4-5 (Jan. 29, 1986); CR VOL. I.AA, EXH. 156, CR 15712-13; Comments of the National Association of Broadcasters, Appendix Volume, in MM Docket No. 88-138 at 3-4 (July 8, 1988) (Affidavit Gary Dreispul); CR VOL. I.Y, EXH. 128, CR 14729-30.

4. *The Rapid Increase In The Availability Of Cable Programming Networks By 1992 Magnified These Incentives.*

286. The record indicated that: "Similarly, cable television, which reached barely 20% of American television homes in 1980, served more than 60 percent of all U.S. households in 1990. The number of satellite-delivered cable programming networks grew by 160 percent, from 27 in 1980 to 70 in 1990. Dozens of regional cable networks were also launched during the 1980s." Source: "Hearings on Cable Television Regulation" at 584 (Statement of Decker S. Anstrom); CR VOL. I.J, EXH. 18, CR 07589.

287. The following information was in the record: "The number of satellite-delivered cable programming networks grew by 160 percent, from 27 in 1980 to 70 in 1990. Dozens of regional cable networks were also launched during the 1980s." Source: "Hearings on Cable Television Regulation" at 584 (Statement of Decker S. Anstrom); CR VOL. I.J, EXH. 18, CR 07589.

288. The record also indicated that: "In January 1985, when the Cable Act took effect, there were forty-three satellite-delivered cable programming networks. Today . . . there are sixty-two such services, more than a 40% increase over the number in 1985. This figure includes attrition of some cable networks that are no longer in business. There have been forty-four new national networks started up since January 1985, six of these in 1988 alone. In addition, at least twenty-one more services are in various stages of development and should be available to customers in the near future." Source: "Hearings on Competitive Problems" at 233 (Statement of James P. Mooney); CR VOL. I.H, EXH. 14, CR 05166.

289. The record indicated that: "The number of national cable programming services has grown from 49 in 1984, to 59 in 1986, and to 69 in 1990." Source: Reply Comments of Time Warner Inc. in MM Docket No. 90-4 at 3 (March 1, 1991); CR VOL. I.P, EXH. 51, CR 10500.

290. The following information is in the record: "There is no question that the number of programming services offered by cable systems has increased substantially since the passage of the Cable Act in 1984. As we observed in the *Notice*, the number of existing or proposed cable services in 1984 was reportedly 67, while in 1989, the number of domestic exisitng and proposed pay TV and satellite services was reportedly 181. Source: FCC Report, "In the Matter of Competition, Rate Deregulations and the Commission's Policies Relating to the Provision of Cable Television Service," MM Docket No. 89-600 at ¶ 43 (July 31, 1990) (citing 53 Television & Cable Factbook, Cable & Services at 166-71 (1985 ed) and 57 Television & Cable Factbook, Cable & Services at C-3 (1989 ed)); CR VOL. I.L, EXH. 23, CR 09003.

VI. EVIDENCE THAT ABSENT IMPOSITION OF MUST CARRY REQUIREMENTS, A SIGNIFICANT NUMBER OF BROADCAST STATIONS WOULD BE DENIED CARRIAGE, DROPPED, ADVERSELY REPOSITIONED, OR OTHERWISE INJURED BY CABLE CARRIAGE DECISIONS.

A. Evidence That Cable Operators Had Taken, Or Would Take, Adverse Carriage Actions Against Broadcast Stations.

291. The record included the following:

"Since the *Quincy* and *Century* cases were decided, the Commentors have collectively been removed from over 10 cable systems serving numerous local communities with nearly 230,000 viewers. In some instances Commentors were removed from cable systems serving their communities of license, the communities which Commentors are obligated, by the terms of their FCC licenses, to serve (and failure by a television licensee to serve its local community could result in a loss of its five year renewal license). In addition, numerous cable systems, serving over 915,000 viewers, which were scheduled to begin carrying many of the Commentors' stations have in the wake of the Court's decisions unilaterally decided not to begin carriage of these local stations. These actions by Cable Operators have not only economically harmed the Commentors, and collectively the construction costs for Commentors' stations represent initial capital investments of over 30 million dollars, they have effectively denied the Commentors access to the public they are licensed and required to serve."

Source: "Hearings on Competitive Issues" at 720 (Memorandum Re: Joint comments of the Monopoly of Cable Television Systems and the Demise of Independent Free

Television (March 17, 1988)); CR VOL. I.C, EXH. 8, CR 02059.

292. The record indicated that: "HSN also is the largest group owner of broadcast television stations in the country. HSN owns and operates 12 UHF stations and has helped finance the construction and acquisition of six additional UHF stations in partnership with minority entrepreneurs such as Blackstar Communications, Inc., Jovon Broadcasting Corporation, Roberts Broadcasting Company and Urban Broadcasting Corporation. Through its HSN 2 service, HSN provides full-time daily programming to its 12 stations and 16 full time affiliates. These 28 stations each locally produce and air 21 hours of weekly nonentertainment and issue oriented public affairs programs in addition to the HSN shopping format. Additionally, HSN provides daily programming part time to 67 stations, 54 of which are overnight affiliates and to 16 LPTV stations, a total of 111 affiliated stations. The 111 affiliates reach a majority of American homes. However, statistical data we have prepared on the owned and operated stations and full time affiliates show that they are denied access to over 40% of cable homes in their markets." Source: "Hearings on Cable TV Consumer Protection Act of 1991" at 422 (Statement of Roy M. Speer); CR VOL. I.I, EXH. 17, CR 06880.

293. The record also indicated that: "Just four days after the issuance of the *Quincy* decision, Jefferson County (Missouri) Cable, the operator of 10 Missouri cable systems, dispatched a letter to 12 television stations in Kansas City and St. Joseph, Missouri and Topeka, Kansas (Attachment G hereto). The letter, referring to the 'now-defunct must carry rules,' demands at least $8,000 annually in equipment and transmission fees from each station in return for continued carriage in the stations' local service area. The cable opeartors stated: 'If the stations want some stability, they are going to have to pay for it.'" Source: Comments of Association of Inde-

pendent Television Stations, Inc. in MM Docket No. 85-349 at 66 (Jan. 29, 1986); CR VOL. I.BB, EXH. 162, CR 15894.

294. The following information was in the record: "All indications are that non-carriage of local television stations wiil move into the 'wholesale' variety once the crossing is completed. For example, Turner Broadcasting System purchased five consecutive full-page advertisements in a recent issue of *Multichannel News* exhorting cable operators 'to bump former must-carries off Basic' and 'to take advantage of the must-carry ruling' by replacing local signals with its distant 'superstation' WTBS and cable program networks, and offering a 'Must-Carry Conversion Kit' to all systems.[fn] And, as discussed earlier, cable attorneys are advising operators as to how they can strip particular programs from various local stations to form their own 'composite local channel'—which necessarily entails non-carriage of the bulk of each of those stations' other programming." Source: Comments of Association of Independent Television Stations, Inc. in MM Docket No. 85-349 at 67-68 (Jan. 29, 1986) (citing *Multichannel News,* Sept. 23, 1985 at 17-25).; CR VOL. I.BB, EXH. 162, CR 15895-96.

295. The record indicated that: "Since the *Quincy* and *Century* cases were decided, Trinity has been removed from over 22 cable systems serving numerous local communities with nearly 5,500,000 viewers. In some instances Trinity was removed from cable systems serving local communities of license, the communities which Trinity is obligated, by the terms of its FCC license, to serve (and failure by a free television licensee to serve its local community could result in a loss of its five year renewal license). In addition, numerous cable systems, serving over 910,000 viewers, which were scheduled to begin carrying many of Trinity's stations under the post-*Quincy* rules, in the wake of the *Century* decision, unilaterally decided not to begin carriage of these local stations. These actions by cable operators have not only economically harmed Trinity, and collectively the construction and acquisition costs for Trinity's stations represent initial capital investments of over 100 million dollars, they have effectively denied Trinity access to the public it is licensed and required to serve." Source: Comments of the Trinity Broadcasting Network in MM Docket No. 90-4 at 4-5 (Sept. 25, 1991); CR VOL. I.P, EXH. 68, CR 10908-09.

296. The following information was in the record: "The pattern of anti-competitive abuse continues to this day. In Docket 89-600, INTV submitted additional examples of cable's miscreant behavior. We found an additional four stations there were on the air but never given carriage. [KTVD-TV Ch. 20, Denver, CO; WAKY-TV Ch. 56 Melbourne, FL; WGOT-TV Ch. 60 Merrimack, NH; WYHS-TV Ch. 69 Hollywood, FL.] We also uncovered 17 stations that were dropped from cable systems. [KDVR-TV Ch. 31 Denver, CO; KLBJ-TV Ch. 18 Davenport, IA; KSCI-TV Ch. 18 San Bernandino, CA; WACX-TV Ch. 55 Leesberg, FL; WCAJ-TV Ch. 68 Birmingham, AL; WHMB-TV Ch. 40 Indianapolis, IN; WNEG-TV Ch. 32 Toccoa, GA; WOAC-TV Ch. 67 Canton, OH; WTGI-TV Ch. 61 Philadelphia, PA; WCOR-TV Ch. 20 Montgomery, AL; KLJB-TV Ch. 18 Davenport, IA; KTXL-TV Ch. 40 Sacramento, CA; WFLH-TV Ch. 23 Decatur IL; WFXT-TV Ch. 25 Boston, MA; WAMI-TV Ch. 15 Mobile AL; WWAT-TV Ch. 53 Chillicothe, OH; WYED-TV Ch. 17, Goldsboro, NC.] In some cases, a station was dropped or denied carriage on several cable systems." Source: Reply Comments of INTV in MM Docket No. 90-4 at 12-13 (March 1, 1991); CR VOL. I.O, EXH. 49, CR 10463-64.

297. The record indicated that: "The six television stations [owned by Stauffer Communications Inc.] are carried by approximately fifty cable systems. In the past two to three years it has been Stauffer's experience that

these cable systems make station carriage and channel position changes so often that Stauffer does not know from week to week what channel its stations will be carried on or whether the stations will be carried at all by a particular cable system. In some of the more rural areas served by the Stauffer stations, the cable systems have made two to three channel position changes for a particular station each year. Furthermore, Stauffer receives no notice from the cable systems before the stations are removed from the system or are changed to a different channel position; it is incumbent upon Stauffer to make inquires with respect to the status of the stations." Source: Comments of Carl J. Occhipinti, General Manager, KGWN-TV, Cheyenne, Wyoming in MM Docket No. 90-4 at 2-3 (Sept. 25, 1991); CR VOL. I.P, EXH. 69, CR 10918-19.

298. The record also indicated that: "The inability to secure carriage apparently continues today. For example, WPGX-TV, Panama City, FL; WVFT-TV, Roanoke/Lynchburg; WTTV, Bloomington, IN; WPMT-York, PA; WAWA, Rome, GA; WAYK-TV, Orlando, FL; WFMP, Lawrence, MA; WLIG-TV, Riverhead, NY; WHCT, Hartford, CT and many others continue to have problems being carried on various cable systems in their areas." Source: Appendices to Testimony of James B. Hedlund, President, Association of Independent Television Stations, Inc. Before the Subcommittee on Telecommunications & Finance, Committee on Energy & Commerce, U.S. House of Representatives at 23 n.27 (May 16, 1990) (Statement of James H. Quello); CR VOL. I.M, EXH. 24, CR 09176.

299. Congress was informed by Commissioner Quello of the Federal Communications Commission that: "the record before the Commission in its must carry proceeding demonstrated that cable won't hesitate to drop local broadcast signals." Source: "Hearings on Cable Television" at 321 (Statement of James H. Quello); CR VOL. I.D, EXH. 9, CR 02407.

300. The record indicated that: "I have been one of the fortunate few. Through hard work over the last five years, I have convinced systems that represent 40% of South Florida cable subscribers, to carry me on lower channels and tiers with other local stations. But the price has been high. I have provided cable systems with advertising availabilities, large blocks of time and cash payments for new channel cards and other expenses associated with channel shifting. Over the last several years it has cost me nearly one million dollars in cash and air time to secure stable carriage on lower channels. Of course, other operators have been unwilling to negotiate or have told me their hands are tied to corporate offices. Two of our own independent sister stations in other markets experienced the same reluctance or refusals in their respective broadcast areas. Negotiating with local cable systems for access or channel position is a unique experience. There is no competition. Cable can simply say 'no'. I have no alternative." Source: Statement of Harvey E. Cohen, President and General Manager of WDZL, Channel 39, Miami, Florida, Before the FCC, in MM Docket No. 89-600 at 1 (March 2, 1990); CR VOL. I.R, EXH. 85, CR 11503.

301. The record indicated that: "Even while them must-carry rules were in effect, cable companies began to reshuffle channels of local broadcasters. This continues despite clear consumer preference for the local broadcaster's fare over the cable channel which replaced it. I know of no channel repositioning that resulted in anything other than a local station being moved out by a lesser-viewed cable program. The local station was either dropped or moved to a higher channel. Consumers who were accustomed to viewing that local station on its prior channel were disadvantaged or even displaced if their T.V. set could not receive the higher channel on which their preferred programming now appears." Source: "Hearings on Competitive Issues" at 697 (Statement of John Siegel); CR VOL. I.C, EXH. 8, CR 02036.

Congress Was Also Aware That New Broadcast Stations Were Having Trouble Obtaining Cable Carriage

302. The record indicated that: "Cable operators now view new commercial Independent broadcasting stations as little more than unwanted competition for viewers' eyeballs and advertisers' dollars. As a consequence all across the country new stations have met a virtual stonewall of opposition from cable operators who have refused to add these new stations to their service offerings. For example, my company was forced to seek the intervention of a member of Congress in order to secure carriage of our Cleveland station on one area cable system. Cable industry resistance has contributed significantly to the bankruptcy of 23 new Independent television stations." Source: "Hearings on Competitive Issues" at 547 (Statement of Milton Maltz); CR VOL. I.C, EXH. 8, CR 01886.

303. The following information was in the record: "There is substantial evidence of anti-competitive behavior. New broadcast stations have met with a stonewall of resistance from cable refusing to carry their signals. Existing stations have found their signals routed out of traditional channel positions and relegated to the upper tier, or what we call cable Siberia. These local stations are then replaced with cable program services in which the cable operator holds an equity interest, and/or in which he is selling advertising time." Source: "Hearings on Competitive Issues" at 542 (Statement of Wendell Triplett); CR VOL. I.C, EXH. 8, CR 01881.

304. The record indicated that:

> "LeSEA is the licensee of seven full service, independent commercial television stations. Six of the seven stations which LeSEA owns have experienced serious cable carriage problems. Stations which were operating prior to the invalidation of the Commission's former must-carry rules have experienced numerous instances of cable systems deleting the stations from carriage. *New stations, which commenced operations subsequent to the invalidation of the must-carry rules, have had extreme difficulty obtaining cable carriage* and in at least two instances are not carried on any cable system in their market. The lack of cable carriage for these six LeSEA stations has severely restricted their access to significant portions of the markets which they are licensed to serve. This has resulted in reduced revenues, operating losses, and the need to reduce or terminate local, community oriented programming. In many instances the cable systems which have refused to carry the LeSEA station are competing directly against the station in some form, including the provision of religious programming, local sports, and barter programming, and in each instance they compete with the station for advertising revenue. The lack of access to cable television household, and the concomitant revenue losses, threaten the continued economic viability of the LeSEA stations and stations similarly situated."

Source: Comments of LeSEA Broadcasting Corporation, in MM Docket No. 90-4 at i-ii (Sept. 25, 1991) (emphasis added); CR VOL. I.P, EXH. 65, CR 10827-28.

Congress Was Also Aware of Cable Plans to Drop or Reposition Broadcasters, and Many Cable Operators Publicly Acknowledged Their Strong Desire to Do So

305. The following information was in the record: "Cable operators around the country, now planning budgets for 1987, the first year cable rates will be wholly deregulated, are more and more looking to restructuring channel lineups so that satellite-delivered cable services take the low-numbered channel slots near or adjacent to

local broadcast network affiliates. Likely to lose those low-numbers slots and be pushed to upper channel spaces, according to a number of system operators, are UHF broadcast stations, duplicative network affiliates, alpha-numeric services and access channels." Source: "Hearings on Competitive Issues" at 659, CR VOL. I.C, EXH. 8, CR 01998.

306. The record indicated that: "In a bid to program cable channels in much the same way television stations program their broadcast hours, United Cable Television Corp., the nation's ninth largest cable operator, said last week it is developing plans for a company wide channel realignment program that could move network affiliates and independent stations out of low bandwidth positions and into spots on the upper reaches of system lineups. United chairman and chief executive officer Gene Schneider said the plan to move broadcasters is still just a tentative part of an overall plan to realign basic cable services on United systems. 'We haven't come to a complete conclusion on this, but we think it's interesting to move some of these network stations around the dial, he said. United marketing and programming vice president Nimrod Kovacs likened the new programming theory to shopping mall designs that encourage traffic past small stores by anchoring large-volume department stores at opposite ends of the mall. He said United hopes to increase viewership of basic cable services by putting them between repositioned network affiliates and independents. The realignment plan will roll out in United systems over the next year. United systems in Denver, CO; Abilene, TX; and Bellevue, NB, will be among the first to undergo lineup changes,' he said." Source: "Hearings on Competitive Issues" at 657 (*Multichannel News,* "Channel Realignments: United Cable Eyes Plan to Bump Network Affils to Upper Channels; TCI Unit Will Cluster Independents," Nov. 3, 1986, p. 1); CR VOL. I.C, EXH. 8, CR 01996.

307. The record indicated that: "United [Cable Television Corp.] has eight to 10 services it wants to place in better channel positions, including what Mr. Kovacs termed United 'must-carries'—services in which United has an equity position, including The Discovery Channel, the Preview Network and Cable Value Network." Source: "Hearings on Competitive Issues" at 658 (*Multichannel News,* "Channel Realignments: United Cable Eyes Plan to Bump Network Affils to Upper Channels; TCI Unit Will Cluster Independents," Nov. 3, 1986, p. 1) (referring to Nimrod Kovacs, United Marketing and Programming Vice President); CR VOL. I.C, EXH. 8, CR 01997.

308. The following information was in the record: "One of the first companies to begin this channel-shifting process was Heritage Communications, which months ago reconfigured lineups in Dallas and Des Moines and is now dedicated to making such changes 'wherever the opportunity presents itself,' said Jim Braun, program manager. Such changes are not being effected in other major Heritage systems, including south Texas and South Bend, IN, he added. Heritage had identified what it called a 'core four package' of cable services it would like to put on the V-band (channels 2-13) of systems: CNN, ESPN, MTV: Music Television and USA Network. Moving these services to lower-numbers channels and near broadcast affiliates, Mr. Braun said, will increase spot viewing of the services, leading to increased cable viewing overall and to an increased perception of value in cable by the subscriber." Source: "Hearings on Competitive Issues" at 658 (*Multichannel News,* Sept. 8, 1986); CR VOL. I.C, EXH. 8, CR 01998.

309. The record indicated that: "In the early stages of research into V-band and broadcast channel adjacency for cable networks is American Cablesystems Corp., which assistant vice president, marketing, David Thaler said was also doing research system by system. American has also

begun talking to other operators in its markets about configuring channel lineups the same throughout a market—the 'fixed channel concept. Boston is one of the markets where the talks have gone farthest, where 600,000-700,000 cable subscribers may be affected, said Mr. Thaler. Charles Townsend, Colony Communications president, said the game plan there would be to select four or five top cable channels and put them next to the broadcast channels. Mr. Townsend said the research he's seen on such restructuring 'is tremendous,' noting the proximity to broadcast stations rather than specific low-numbered channels seems to be most important." Source: "Hearings on Competitive Issues" at 661-62 (*Multichannel News,* Sept. 8, 1986); CR VOL. I.C, EXH. 8, CR 02000-01.

310. The record also indicated that: "United Cable Television Corp. is also looking at system-by-system lineups, with an eye toward putting cable services 'with the greatest potential' on the lower bandwidths and near broadcast affiliates, said Nimrod Kovacs, vice president of marketing. Services with potential, he said, are those with consumer appeal or those with possibilities for strong local ad sales. He said he believes a cable service moved to a lower-numbered channel could gain 50 percent in local ad sales, 'if not double.'" Source: Hearings on Competitive Issues" at 661 (*Multichannel News,* Sept. 8, 1986); CR VOL. I.C, EXH 8, CR 02000.

311. Congress was also aware of the following information:

> "Comcast, according to president and chief executive officer Robert Clasen, has seven to eight basic services it would like to see on lower bandwidths, nearer broadcast affiliates. 'You probably only need four broadcast stations below (channel) 13,' Mr. Clasen said, adding, *'We'd rather viewers migrate to cable.' To get such lineups, Comcast expects to drop former*

> *must-carries, depending on how the rules are finally structured, according to Mr. Clasen, who noted his system had already axed 10-12 stations. Comcast in now reviewing channel lineups on all its systems as part of its budget process; Mr. Clasen said half to 70 percent of the operators' systems would have significant channel realignments in the coming year.* 'We view this as an opportunity to come back and resell the product,' he stressed."

Source: "Hearings on Competitive Issues" at 661 (*Multichannel News,* Sept. 8, 1986) (emphasis added); CR VOL. I.C, EXH. 8, CR 02000.

312. The record indicated that: "Shifts are made solely to enhance the competitive position of the cable operator's programming and his advertising availabilities. Any doubt regarding the motivation for the cable channel shifts can be resolved by the candid explanation of one major MSO—Jones Intercable. In a May 27, 1987 letter to advertisers, Jones described its motivation for a recent channel shift as follows: 'On March 1, 1987, Jones Intercable made changes that greatly enhanced the value of advertising placed with us. On that date, we realigned our channels bringing four of the five channels (The Nashville Network-4, Cable News Network-6, ESPN-12, and USA-8) on which we insert advertising to channel positions between 2 and 13." Source: "Hearings on Cable Television Regulation" at 880-81 (Statement of James B. Hedlund); CR VOL. I.J, EXH. 18, CR 07884-85.

313. Congress was also aware of the following report:

> "Under TCI's plan [if it succeeds with its takeover of Group W Cable], KSTW (Channel 11) would be shifted to Channel 23, KCPQ (Channel 13) would appear on Channel 24, and Bellingham's KVOS (Channel 12) would be placed on Channel 32. KTPS (Channel 28), Tacoma's public-TV station, would be dropped entirely and stands to lose the 34

percent of its subscribers who live in the Seattle area. Several of the most desirable lower-numbered spots would be given to programming favored by the cable conglomerate. The Cable News Network would be on Channel 3, American Movie Classics (a new movie service) would be on Channel 6, Lifetime cable would be on Channel 8, ESPN sports would be on Channel 10, Disney would be on Channel 12, Nickelodeon would be on Channel 13, The Weather Channel would be on Channel 14 and a cable shopping program would be on Channel 15. *TCI spokesman Curtis Speck, general manager of Seattle's Group W, admitted that TCI owns stock in CNN, American Movie Classics, The Weather Channel, the shopping service, Discovery Channel (which would be on Channel 33) and the Black Entertainment Network (which would share space with other shows on Channel 34).*"

Source: "Hearings on Competitive Issues" at 663 (*The Seattle PI*, Dec. 4, 1986) (emphasis added); CR VOL. I.C, EXH. 8, CR 02002.

314. The record indicated that: "Several top MSOs are studying shifting broadcast signals and basic cable program services on their cable systems nationally. [The m]otivator is potential for selling local ads on basic cable program services that would be positioned surrounding better-watched network affiliates and for improving viewership of program services in which they have equity stake." Source: Petition for Reconsideration of Association of Independent Television Stations, Inc. in MM Docket No. 85-349 at 13 n.10 (Jan. 7, 1987) (quoting *Communications Daily*, No. 10, 1986, p. 3); CR VOL. I.CC, EXH. 181, CR 16671.

315. The record included the following information: "The six television stations [owned by Stauffer Communications Inc.] are carried by approximately fifty cable systems. In the past two to three years it has been

Stauffer's experience that these cable systems make station carriage and channel position changes so often that Stauffer does not know from week to week what channel its stations will be carried on or whether the stations will be carried at all by a particular cable system. In some of the more rural areas served by the Stauffer stations, the cable systems have made two to three channel position changes for a particular station each year. Furthermore, Stauffer receives no notice from the cable systems before the stations are removed from the system or are changed to a different channel position; it is incumbent upon Stauffer to make inquiries with respect to the status of the stations." Source: Comments of Carl J. Occhipinti, General Manager, KGWN-TV, Cheyenne, Wyoming in MM Docket No. 90-4 at 2-3 (Sept. 25, 1991); CR VOL. I.P, EXH. 69, CR 10918-19.

316. The following information was also in the record:

> "Channel positioning The Commission is aware that cable systems have engaged in repositioning broadcast signals to obtain better channel positions for programming on which the cable system can place advertising and to diminish the attractiveness of the broadcast signals. Cable industry leaders are now discussing the need to adopt 'universal' channel lineups for cable programming to increase their ability to compete for advertising. *See Cablevision*, January 14, 1991, at 4, 20, 24. Doubtless these plans will mean shifting broadcast channels off of their established channel positions."

Source: Comments of the National Association of Broadcasters on the Further Notice of Proposed Rule Making in MM Docket No. 90-4 at 34 (Feb. 14, 1991); CR VOL. I.O, EXH. 45, CR 10348.

B. Testimony, Commentary And Reports Concerning Broadcast Stations That Had Already Been Denied Carriage, Dropped, Or Adversely Repositioned.

KAME

317. The record included the following: "KAME-TV, channel 21, Reno, Nevada, has been shifted on four different cable systems. TCI in Reno, Nevada, shifted the station from channel 6 to channel 21 after 7 years at the former position. The station was replaced by the Disney Channel and no longer is part of basic service. The only explanation given was to put the over-the-air stations on their correct over-the-air channels. TCI in North Tahoe, Nevada also shifted KAME, from channel 10 to channel 24. No notice about the shift was given, no negotiations were allowed, and the only explanation given was that they were acting on a survey they had conducted. TCI in Carson City, Nevada, also shifted the station, from channel 7 to 28, then to 21. No notice was given, no negotiations allowed and no explanation provided. Last, TCI in South Tahoe, Nevada, shifted KAME from channel 9 to channel 21 with no notice and negotiation. The only explanation offered that they were acting on a survey they had conducted." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 Exhibit B at 12 (Sept. 25, 1991); CR VOL. I.K, EXH. 21, CR 08462.

318. The record also indicated that: "Since its inception, Independent KAME was carried, along with the other local stations, on the first twelve channels of all the area cable systems. Then, with little warning last year, TCI bounced KAME up to channel 21 on its North and South Tahoe and Carson City systems, which serve 40,000 subscribers. TCI has announced that it will do the same on its 40,000 subscriber Reno system as well. Although KAME was moved to the cable 'Siberia' the network

affiliates were left on the first twelve channels as was WTBS, the Atlanta UHF station of which TCI is a principal owner. In its new position, KAME cannot be received on non-cable ready TV sets unless the consumer can afford to rent or buy a converter from TCI. Moreover, KAME is not available in any hotel in these cable areas (hotels usually get only the first twelve channels of cable service), which puts it at a severe disadvantage in selling local advertising since many businesses in this tourist area actively seek to reach visitors in their hotel rooms." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 1 (Sept. 25, 1991) ("Free Television Under Siege," INTV (May 1988)); CR VOL. I.K, EXH. 21, CR 08554.

KBHK

319. The record included the following information about KBHK:

> "In the early 1970's KBHK assiduously negotiated with the over 40 San Francisco area cable companies to have its cable carriage unified at channel 12 for nearly 90 percent of all Bay Area cable subscribers.
>
> KBHK then used this unified cable position as the centerpiece of its promotional campaign. Over time, it devoted the equivalent of millions in promoting its identity as 'Bay Area Cable 12' (and even promoted the benefits of cable subscribership on billboards and elsewhere). The name 'Bay Area Cable 12' became so identified with KBHK that it was registered as a trade name. By 1985, the development of this identity had helped KBHK become the number one rated UHF station in San Francisco.
>
> In 1985, however, the Commission suspended the enforcement of its must-carry rules, in the wake of the *Quincy* decision. During roughly the same period, cable operators began to enter the market for the sale of local advertising time. There was in

consequence a drastic change in KBHK's relationships with cable. The system controlling cable access to the 300,000 residents of Oakland switched the channel position of KBHK in June 1985, again in July 1985, again in September 1985, and yet again in March 1987.

In late 1986, a major multiple system owner ('MSO') began moving KBHK from its position as 'Bay Area Cable 12' to positions farther up the dial on seven different Bay Are cable systems: Sunnyvale, Pacifica, Fremont, San Mateo, Daly City, San Carlos, and Travis Air Force Base. Not only was KBHK removed from its established position on channel 12, it was given different new positions on each of the seven cable systems. And it was replaced with a cable program channel, which competes with KBHK for the sale of local advertising and in which the MSO owned a major equity interest. The MSO promised KBHK that these shifts were only 'temporary' and that KBHK would return to channel 12 in a matter of months. Those months have stretched into four years and counting; KBHK remains stuck in differing positions farther up the dial on each of those systems today."

Source: Comments of Chris-Craft Industries, Inc. in MM Docket No. 90-4 at 10-12 (Sept. 25, 1991); CR VOL. I.Q, EXH. 74 CR 11239-41.

320. The record also indicated:

"On January 27, 1989, TCI's Millbrae, California cable system moved KBHK from its long held channel 13 position to channel 22. TCI replaced KBHK with a cable program network in which TCI owns a significant equity interest. Additionally, TCI derives advertising revenue from the sale of local advertising time in this cable program network in direct competition with KBHK. The channel shift occurred

three days before the very important February Nielsen and Arbitron rating sweeps. TCI did not move KBHK to its 'on channel' designation which TCI so often asserts as a rationale for its truly anti-competitive intent.

TCI does not separately break out a charge for the converter box it leases subscribers for their first TV set. TCI does charge for converter boxes for subscribers' second, third and other sets. When a TCI installer comes to a home he disconnects the antenna to all TV sets and hooks up all sets to TCI's system. If the subscriber chooses not to pay for additional converter boxes and if his/her second, third, etc. sets are not 'cable ready', then he/she will most likely not be able to receive channels higher than channel 13 on the cable system. By shifting KBHY from channel 13 to channel 22, KBHK can no longer be viewed on many of these second, third, etc. TV sets unless the subscriber now pays TCI an additional fee for converter boxes.

This represents a classic bait and switch. KBHK is significantly more popular than any cable program network. Therefore, to attract (bait) consumers in the first place to cable, TCI offered KBHK at one price. Then once the market is penetrated to a certain degree, TCI shifts (switches) the channels so that the subscriber now has to pay more (to rent additional converters) to get what he/she originally received for free. All the while TCI is disadvantaging a direct competitor and enhancing its own program channel.

KBHK engaged a nationally recognized research firm to conduct a survey of the Millbrae cable households. The result of the survey revealed that by moving KBHK from channel 13 to 22 20% of the households with second sets who could receive

KBHK before the move can no longer receive KBHK on the second, third, etc. sets unless they pay TCI an added fee."

Source: "Hearings on Competitive Problems" at 519; CR VOL. I.H, EXH. 14, C R05456-57.

321. The record further indicated that: "On April 10, 1989, TCI's Pacifica system shifted KBHK from channel 22 to channel 44. . . . [T]his was the second shift of KBHK on this system in a 24 month period. Two years ago TCI Pacifica shifted KBHK from channel 12 to channel 22. You will note this was not 'on channel' and raises the second set converter box issue mentioned above. Interestingly enough also, after the April 10, 1989 move, channel 22 remains black. The latest move to channel 44 is almost as bad as if TCI had dropped KBHK from its system. . . . [E]ven existing cable subscribers who received TCI's 'free' first set, converter box cannot receive KBHK unless they disconnect their old box and bring it down to the TCI office for a new one. The old TCI box only goes up to channel 30, making it impossible to view KBHK at its new channel 44 position." Source: "Hearings on Competitive Problems" at 519; CR VOL. I.H, EXH. 14, CR 05457.

322. It was also reported in the record that: "Century Cablevision in Ukiah, California deleted KBHK from their system altogether. No notice was given for the deletion, and no negotiations were allowed. The only explanation given was that the station had poor reception via the microwave provider. Although the station did offer to improve their equipment, the system did not agree and kept the station off the system." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4, Exhibit B at 11 (Sept. 25, 1991); CR VOL. I.K, EXH. 21, CR 08461. *See also* Comments of Chris-Craft Industries, Inc. in MM Docket No. 89-600 at 18-19 (March 1, 1990); CR VOL.

I.S, EXH. 99, CR 11978-79; Comments of Chris-Craft Industries, Inc. in MM Docket No. 89-600 at 2-3 (March 1, 1990) (Declaration of Dr. G. Anthony Siesfield); CR VOL. I.S, EXH. 99, CR 11962-63.

KCPQ and KSTW

323. The record indicated that these stations, in Tacoma, Washington, were "repositioned to higher channels on a number of TCI systems [and] replaced by various advertiser supported channels." Source: Reply Comments of the National Association of Broadcasters, Appendices, in MM Docket No. 89-600 at 4 (April 2, 1990) (Reply Comments of the NAB); CR VOL. I.X, EXH. 119, CR 14353.

KCRG

324. The record indicated that: "Since the repeal of the must-carry rules, however, KCRG-TV has had an increasing difficulty with its cable system carriage in a number of communities. As detailed below, the most significant problems have centered around the refusal of TCI Cablevision of Dubuque, Inc. ('TCI') to carry KCRG-TV in full on its over-the-air channel on the local Dubuque, Iowa cable system. Moreover, KCRG-TV's signal has been dropped in its entirety from additional cable systems located in New Albin, Iowa; Keystone, Iowa; Garrison, Iowa; Clarksville, Iowa; Strawberry Point, Iowa; North English, Iowa; Soldier's Grove, Wisconsin; Gays Mills, Wisconsin; Ferryville, Wisconsin; Bell Center, Wisconsin; and Boscobel, Wisconsin. In addition, the station has been dropped by the TCI system located in Galena, Jo Daviess County, Illinois." Source: Comments of Cedar Rapids Television, Inc. in MM Docket No. 88-138 at 2 (July 8, 1988); CR VOL. I.Z, EXH. 137, CR 15260.

KCWT

325. The record included the following information: "KCWT-TV, channel 27, Wenatchee, Washington is the

only over-the-air broadcaster in the community. TCI Cable shifted the station from channel 6 to 27 replacing the station with American Movie Classics, ignoring the complaints and wishes of the local subscribers." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4, Exhibit B at 7 (Sept. 25, 1991); CR VOL. I.K, EXH. 21, CR 08457.

KDOC

326. The record included the following: "Attached you will find specific instances where KDOC has either been dropped or had their channel position arbitrarily changed without notice by the cable systems . . . KDOC is currently on approximately 50% of the cable homes in our market." Source: Letter from Charles S. Velona to FCC in MM Docket No. 90-4 at 1-2 (Sept. 10, 1991) (Listing nine systems on which it has been dropped, and numerous others where it has been repositioned.); CR VOL. I.GG, EXH. 204, CR 18149-50.

327. The record also indicated: "KDOC, channel 56, Anaheim, California, has been dropped by nine cable companies and shifted by another fifteen. All of the situations are essentially the same. The cable companies offer no explanation for a shift or deletion that occurred with little or no notice and no negotiations. KDOC was deleted by Falcon Cable-Pacific Palisades, Falcon Cable-Topanga, Choice Cable, Group W Cable, Comcast Cable, Southland Cablevision, Moreno Valley Cablevision, Inland Valley Cablevision-La Serena, and Inland Valley Cablevision-Fern Valley. KDOC was shifted by Galavision, Century Cable-Redondo Beach, Century Cable-Eagle Rock, Comcast Cablevision, Copley Colony Cablevision, M.L. Media-Manhattan Beach, M.L. Media-Anaheim, Sammons Communications, Times Mirror Cable TV, Dimension Cable, Insight Cable, Utility Development Systems, Cablevision, M.L. Media, and Paragon Cable." Source: Comments of the Association of Independent

Television Stations, Inc. in M.M. Docket No. 90-4, Exhibit B at 11 (Sept. 25, 1991); CR VOL. I.K, EXH. 21, CR 08461.

KDVR

328. The record indicated that: "KDVR, Channel 31, is licensed to Denver, Colorado. Because *KDVR* was dropped from the Net Link satellite service (*See* above), no longer is carried on numerous cable systems, including four cable systems located within 35 miles of the station." Source: Comments of the Association of Independent Television Stations, Inc. in MM Docket No. 89-600 at 50 (March 1, 1990); CR VOL. I.U, EXH. 107, CR 12616.

329. The record also indicated: "KDVR, channel 31, Denver, Colorado, has been shifted by two cable systems and deleted by 21. Mile High Cablevision in Denver shifted KDVR from channel 10 to channel 31, and United Cable, also in Denver, shifted the station from channel 10 to 31. The two companies made the shifts in precisely the same way, notifying the station directly before the shift, allowing no negotiations and offering no explanation for the shifts. Of the 21 cable systems that deleted KDVR from carriage, not one company gave any notice of deletion, not one company allowed any negotiations and all of the 21 companies that deleted KDVR used the same explanation—because Netlink dropped KDVR, the cable system could no longer carry the station. The companies that dropped KDVR were Mountain Valley Communications which is within 35 miles of the station, Pagosa Vision-Blackhawk, also within 35 miles of the station, Pagosa Vision-Nederland, which is also within 35 miles of the station. St. Vrain Cable Ltd. which is within 35 miles of the station deleted KDVR." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4, Exhibit B at 12 (Sept. 25, 1991); CR VOL. I.K, EXH. 21, CR 08461.

KEPR

330. The record indicated that: "For example, United Artists Cablevision Corp., a cable operator in the "Tri-Cities" market of Pasco-Richland-Kennewick, Washington, recently 'repositioned' KEPR-TV, the local CBS affiliate, from cable channel 7, where it had been carried for over 25 years, to cable channel 19, and replaced it on the lower channel with a program preview service. This change was made despite the fact that cable channel 19 is subject to severe interference from two-way business radios and high-powered paging systems that produce an obscuring pattern on the television screen. The repositioning is likely to have a serious adverse impact on KEPR TV's local audience, because of both subscriber confusion and poor signal quality. The channel repositioning is particularly troubling in light of the recent comments by an executive of United Artists that his cable systems' revenue growth in coming years will be largely from a growth in advertising revenues, an area in which he competes directly with local television stations." Source: Comments of the 97 Television Stations in MM Docket No. 89-600 at 5-6 (March 1, 1990); CR VOL. I.S, EXH. 100, CR 11999-12000.

KTFH

331. The record included the following information: "Another illustration of the effects of lack of cable carriage is station KFTH, Conroe, Texas. The station has sought protection under the bankruptcy laws and is on the verge of converting its Chapter 11 reorganization into a Chapter 7 liquidation proceeding. The conversion would result from the station's inability to service its debt. Income has been insufficient largely because the station is not being carried on cable in the Houston market, where the station is located. *Twenty-seven systems with 95% of the cable subscribers in the market refuse to carry the station. Consequently, the station has*

no access to nearly 50% of the households in the market. The station finds advertisers reluctant to buy time on the station because it is not carried on cable. The service lost if the station fails will be significant. KFTH is a Spanish-language station serving a large niche in the market, which is 23% Hispanic. The station broadcasts 18 hours of Spanish-language programming seven days per week including six hours per week of locally-produced programming. This service will vanish from the market if the station is forced into liquidation." Source: Reply Comments of the Association of Independent Television Stations, Inc. in MM Docket No. 90-4 at 17-18 (Oct. 25, 1991) (emphasis added); CR VOL. I.Q, EXH. 81, CR 11375-76.

332. The record included the following:

> "KTFH-TV signed on the air on June 16, 1989 and serves the Houston, Texas area. The station broadcasts over eighteen hours per day, seven days per week of Spanish language programming from Mexico serving Houston's large Hispanic community who make up 23% (1990 census) of the total population.
>
> KTFH-TV's ability to serve the public has been severely harmed by its lack of cable carriage. The station is currently under a Chapter 11 bankruptcy. (Case #89-00975-HS-11). The bankruptcy was originally precipitated by a stockholder dispute which occurred in early 1989 before KTFH-TV signed on the air in June of that year.
>
> However, KTFH-TV has not been able to come out of its bankruptcy since it was filed over two and one half years ago despite the fact that KTFH-TV's experienced management team has been able to operate the station on an extremely low overhead cost of $107,000 per month. The lack of cable carriage has prevented the station from generating enough income to service its debt of $3,000,000.

The reason for this is that Houston has a cable penetration of 50% and KTFH-TV is carried in less than 5% of those cabled homes, essentially locking the station out of nearly half of all of the television homes located within its coverage area.

Naturally, the lack of carriage severely inhibits the station's ability to garner ratings and attract advertisers. Even smaller local advertisers, most of whom are small Hispanic businesses (the station's 'bread and butter') who are not 'ratings orientated' advertisers are reluctant to advertise with KTFH-TV because they know the station is not carried on cable and cannot be seen by half of the viewing public."

Source: Comments of KTFH TV, Conroe, Texas, in MM Docket No. 90-4 at 1-2 (Sept. 25, 1991); CR VOL. I.P, EXH. 62, CR 10770-71.

KMGC, KOKH & KAUT

333. The record indicated that: "In one of the first major channel shifts in the nation, Cox Cable in Oklahoma City announced a plan to move all the local stations. The network affiliates were moved off their FCC-assigned channels to other locations on the first twelve channels (the explanation was that the affiliates, when carried on-channel, experienced co-channel interference—a problem which only began shortly before the cable system announced the channel shift!). More serious was the relocation of all three local Independent stations from their long-held positions in the first 12 channels to a grouping in the low 30's (note: distant signal WTBS was kept on channel #12, while distant signal WGN, which had been carried on channel #14, was rewarded with cable channel #11). To confuse the viewers as thoroughly as possible, KAUT—which is channel #43 over-the-air—was placed on cable channel #34. Channel #34 is the FCC-assigned channel for KGMC (KGMC was given cable channel #33). While the KAUT-KGMC

situation was subsequently undone, the over-all damage to the local Independents remains. KOKH was moved from the 1st 12 to the lower 30's." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 (Sept. 25, 1991) ("Free Television Under Siege", INTV (May 1988)); CR VOL. I.U, EXH. 21, CR 08555.

KGWN

334. The following information was in the record: "In January of 1989, Columbine Cablevision serving Fort Collins, Colorado completely removed KGWN-TV from its system and did not place KGWN-TV back on the system until January of 1991. When Columbine Cable vision brought KGWN-TV back onto its system serving Fort Collins, it placed KGWN-TV on Channel 26 instead of Channel 5, its cable channel position prior to removal (and its over-the-air channel position). This change decreased KGWN-TV's viewership because viewers tend to tune into the lower channels on the cable system rather than the higher channels, and Channel 5 is KGWN-TV's position on the over-the-air TV dial, where TV viewers are accustomed to finding it. In 1990, Scripps-Howard Cable removed KGWN-TV from its system operating in Lafayette, Colorado, Longmont, Colorado, & Louisville, Colorado. Approximately three years ago, Boulder Cable TV also removed KGWN-TV from its system. In January of 1989, Greeley Cable vision cut its carriage of KGWN-TV from full time to part time. As a result, KGWN-TV is only carried by Greeley from 6 a.m. to 6 p.m. Viewers in Greeley, therefore, are deprived of part or all of KGWN-TV's early evening newscast." Source: Comments of Carl J. Occhipinti, General Manager, KGWN-TV, Cheyenne, Wyoming in MM Docket No. 90-4 at 4 (Sept. 25, 1991); CR VOL. I.P, EXH. 69, CR 10920.

KICU

335. The record indicated that: "In December, 1988 KICU-TV in San Francisco, was shifted off of channel 6 to make room for a cable "barker" channel promoting the system operator's proprietary pay-per-view service." Source: "Hearings on Cable TV Consumer Protection Act of 1989" at 352-53 (Statement of Edward O. Fritts); CR VOL. I.H, EXH. 14, CR 05285-86.

336. The record also indicated that KICU was "repositioned to higher channels on a number of local cable systems [and] replaced with advertiser supported ESPN, CNN or USA Network." Source: Reply Comments of the National Association of Broadcasters, Appendices, in MM Docket No. 89-600 at 4 (April 2, 1990) (Reply Comments of the NAB); CR VOL. I.X, EXH. 119, CR 14353.

337. The following information about KICU was also in the record: "KICU-TV has been repositioned to higher channels on 13 cable systems in the San Jose/ San Francisco area, and on virtually all of these systems, advertiser-supported pay cable services such as ESPN, CNN and USA Network have been placed on the lower channel. Because these services compete directly with the stations for advertising, the repositioning has a direct, detrimental impact on a station's revenues." Source: Comments of Shamrock Broadcasting, Inc. and Ralph C. Wilson Industries Inc. in MM Docket No. 88-138 at 5 July 8, 1988); CR VOL. I.Z, EXH. 135, CR 15250.

KIFI

338. The record included the following information about KIFI:

> Station KIFI-TV is a full-service VHF, NBC network affiliate television station in the Idaho Falls-Pocatello, Idaho Arbitration Area of Dominant Influence (ADI). Even though KIFI-TV is a network affilitate station, it has suffered from the absence of must carry rules. . . .
>
> For instance, approximately two years ago KIFI-TV was taken off the TCI cable system in Teton County, Wyoming, which is in the Idaho Falls-Pocatello ADI. In an effort to persuade TCI to put KIFI-TV back on its system, Post commissioned Atkinson Research Associates of Minnesota to prepare a showing of the preferences of viewers in Teton County, which includes Jackson Hole. Though KIFI-TV had been removed from the cable system over a year before the study, two out of three homes in Teton County wanted KIFI-TV as one of the two NBC stations on the cable system. Viewers substantially preferred KIFI-TV over the NBC affiliate KTWO, Casper, Wyoming, which is now on the system. This preference is particularly significant since it is very difficult for viewers who are on cable to receive KIFI-TV. KIFI-TV even commanded a preference close to that received by NBC affiliate, KUTV, Salt Lake City, Utah, which is carried by TCI.
>
> Additionally, the research showed that Idaho Falls dominates as the most important city in the Teton County region, both for services and local newscast interests. Salt Lake City came in a distant third with respect to interest in local newscasts, and received only half the interest which Idaho Falls received for shopping, medical and other services.
>
> Another study (Exhibit No. 2) combined both Lincoln and Teton Counties (both of which are in the Idaho Falls-Pocatello ADI), and confirmed that residents there chose Idaho Falls as the city which dominates all others in the region in terms of shopping, medical services and local news interests.
>
> A copy of these studies was provided to TCI with a request that KIFI-TV be reinstated on its Teton

County cable system. Despite this evidence, TCI has refused to return any telephone calls from Post or acknowledge the studies. TCI, the nation's largest cable company, has basically ignored the wishes of its subscribers—and, therefore, the public interest—in choosing the stations to be carried on its system.

In a similar incident, KIFI-TV was dropped without notice by Sun Valley Cablevision, Inc., the operator of a cable system in Sun Valley, Idaho—also in the Idaho Falls-Pocatello ADI. KIFI-TV received numerous complaints from Sun Valley residents about its absence from the system. In an attempt to rectify the situation, Post sent numerous letters to the cable company and tried to contact its representatives by telephone. Post has never received a response.

. . .

Local cable systems are the only multi-channel providers in the Idaho Falls area. However, Post has no means—to include the provision of desired local programming—to obtain carriage. And, Post depends on cable carriage to reach the majority of its viewers. Approximately 51.7% of the homes in the Idaho Falls-Pocatello ADI receive programming via cable. Without access to cable, Post cannot reach these viewers. As such, Post is in danger of losing its most significant source of revenue—local advertising. Indeed, Post has already suffered economic harm from the loss of advertising from local businesses in Jackson, Wyoming and Sun Valley, Idaho.

Source: Comments of the Post Company in MM Docket No. 90-4 at 1-4 (Sept. 19, 1991); CR VOL. I.P, EXH. 59, CR 10724-27.

KIIN

339. The record included the following information: "For example, in Iowa TCI decided to move Iowa Public Television's KIIN from its over-the-air Channel 12 to Channel 22 in four towns in Dubuque County. Cable

carriage is particularly important to Dubuque County because of its hilly topography and the effect of that terrain on the over-the-air signal. Following Dubuque Cable TV's decision to move KIIN from Channel 12 to Channel 22, Iowa Public Television noticed that membership contributions from the area of the channel shift were down 75 percent as compared to the rest of the state. The channel shift meant that viewers needed a converter for non-cable ready sets. Even though one free converter box was provided to subscribers, many subscribers apparently did not obtain the converters, did not know how to install them, or did not acquire them for second set in their homes." Source: "Hearings on Must Carry" at 102 (Statement of David Brugger); CR VOL. I.F, EXH. 12, CR04112.

KLXV

340. The record included the following information: "KLXV-TV, channel 65, San Jose, California, reported as follows in February, 1990: '[W]e did not sign on the air until November 15, 1986, shortly after must-carry rules were repealed. . . . [W]e are currently on only one cable system . . . and that is because we were programming a cable channel (since 1982) on their system previous to our sign-on as a full broadcast station. . . . [W]e have begun meeting with Cable system in our coverage area. The preliminary feedback from the following cable systems is that their System is at "capacity." Although these cable operators stated their intent of expanding their system capacity to 57-70 Channel systems by the end of 1990 to early 1991, they could not make any promise of carriage. They will determine what Stations or cable services they will carry by subscriber research. We have also experienced negative overtones from a few cable systems. Many systems have refused to even meet with us because it was stated [to be a] 'waste of their time.'" Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 (Sept. 25, 1991); CR VOL. I.K, EXH. 21, CR 08371-72.

KMCI

341. The record included the following information: "KMCI is licensed to Lawrence, Kansas, and began operation on February 1, 1988. The station never has been carried on the cable system in its community of license. The system, Sunflower Cablevision, has 15,577 subscribers." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4, Exhibit B at 2 (Sept. 25, 1991); CR VOL. I.K, EXH. 21, CR 08452.

342. The record also indicated that KMCI is "a fairly new station that has sought carriage on many systems, [but] has been unable to obtain carriage with any of the many cable companies which could feasibly carry the station." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4, Exhibit B at 2 (Sept. 25, 1991); CR VOL. I.K, EXH. 21, CR 08463.

KMLM

343. The record indicated: "KMLM TV-42 is the newest station in the Odessa ADI. It is one of five (5) full-service, commercial TV stations. There are thirteen (13) cable systems within the 50-mile radius of KMLM-TV. Without the benefit of 'must carry,' we have been able to obtain carriage on ONLY ONE of those thirteen (13) systems, or *LESS THAN EIGHT PERCENT* (7.4%). We obtained carriage on the one system only after we agreed to purchase the cable processing equipment needed to convert our signal to their cable channel —equipment that cable companies normally provide." Source: Comments of Al Cooper, President and General Manager, Prime Time Christian Broadcasting, Inc., in MM Docket No. 90-4 at 3-4 (Sept. 20, 1991); CR VOL. I.P, EXH. 60, CR 10755-56.

KNDU

344. The record included: "Television station KNDU-TV (Kennewick, Washington) indicated that it was repositioned to a higher cable channel because the local cable system manager wanted to, 'force shopping of his lower channels,' a move that was undertaken with two days' notice to the station." Source: Comments of the National Association of Broadcasters in MM Docket No. 89-600, Exhibit 5 at 4 (March 1, 1990); CR VOL. I.T, EXH. 104, CR 12314.

KOKH

345. The record included the following information:

"The problems KOKH and the other local Independents had with channel-shifting on the Oklahoma City cable system are described elsewhere in this report. KOKH had another problem with that cable operator, which was described to INTV by that station:

'In July 1986, KOKH carried the Goodwill Games from July 5-July 20 through syndication with Turner Program Services. Through contractual agreement, we could not request blackout of the WTBS signal. In June, we were approached by a representative of Cox Cable who proposed a blackout of WTBS' carriage of the Goodwill Games in the 65,000 homes serviced by Cox if KOKH would agree to give two three-hour blocks of prime time to Cox Cable to conduct telethons to recruit subscribers. They preferred time during a rating period and also expected free production time. We estimated that the air time and production would cost approximately $32,000 to $40,000. We also explained that we could not enter into a blackout agreement because of our contract with Turner. Cox Cable then advanced the possibility of an interconnect blackout with other area cable systems for a total of 112,000 homes.

Ten days later, KOKH was again approached by Cox Cable and the threat was made that if KOKH did not cooperate with the cable company on their telethons, the station would be dropped from the system during the games. Two weeks later, June 23, the general manager of Cox Cable threatened to blackout KOKH carriage of the Goodwill Games unless we gave him the free production and air time. At this point, the station attorneys were informed of the situation and they, in turn, contacted the attorneys of Cox Cable. KOKH also notified Turner Program Services of the threatened blackout.

At 5:00 pm on July 3, we were contacted by the general manager of Cox Cable who stated he would carry the games on both WTBS and KOKH but, in the future, he would not notify us in advance of anticipated blackouts or even droppage from the cable system.' "

Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 3-4 (Sept. 25, 1991) ("Free Television Under Seige," INTV (May 1988); CR VOL. I.K, EXH. 21, CR 08556-57.

KOOG

346. The record included the following:

"When it signed on October 1985, KOOG became only the second Independent station in the entire Salt Lake City market. Despite a very respectable program schedule, the station was unable to achieve *any* cable carriage whatsoever. Virtually all of the cable systems within 50 miles of Ogden are owned by TCI.

During this period, TCI President John Malone was quoted in the press as having advised financial analysts of his plans to create regional cable channels. Dr. Malone was further quoted as stating that his

new cable channels would be more effective in those regions where multiple over-the-air Independents were *not* well established. He specifically cited the Rocky Mountain States as one such region. Thus, TCI's absolute refusal to carry KOOG had the appearance of anti-competitive behavior.

KOOG's owners and INTV spent a year begging and cajoling TCI to give the station a chance. TCI finally put KOOG on its Ogden system but refused to add it to any of its big Salt Lake City area systems. Because the station was locked out of almost all the cable homes in its market, its ratings were poor and it was unable to meet the payment on its programming contracts. As a result, KOOG affiliated with Home Shopping Network for part of each day just to keep the lights on. TCI, which owns a competing home shopping service, then used their format change as a new excuse to deny KOOG carriage."

Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 4 (Sept. 25, 1991) ("Free Television Under Seige," INTV (May 1988); CR VOL. I.K, EXH. 21, CR 08557.

347. The record also indicated: "In August 1985, KOOG-TV signed on the air as Ogden, Utah's first Independent station, and only the second in the entire Salt Lake City market. For more than ten months, TCI, which owns virtually all of the cable systems in the market, has refused to carry KOOG or any of its systems. As a result, KOOG has had no cable carriage, even though all of TCI's systems have 36 channels. This situation was not the result of many local cable operators each making individual decisions based on 'consumer preference,' but instead was the result of a single decision made by the management of TCI in Denver." Source: INTV Statement in Support of Petition for Rule

Making in RM 5475 (consolidated into MM Docket No. 89-600) at 9-10 (July 21, 1986); CR VOL. I.S, EXH. 97, CR 11876-77.

348. The record also included the following information: "TCI claims that is has offered to carry KOOG-TV on its Ogden system, and KOOG demanded carriage on all its systems, including those on which it would be a distant signal. It is true that *within the past 30 days* (coincident with the intervention of Senator Orin Hatch), TCI has indicated it *might* carry KOOG in Ogden. However, this offer comes ten months after the initial request from KOOG. Moreover, although TCI owns virtually all the cable systems in the Salt Lake City market, and most all are 36 channel systems, *and* it carries four other commercial stations in the market in all of these systems, it has steadfastly refused to carry KOOG on any of these other systems. KOOG would *not* be a distant signal on the majority of these systems." Source: Letter from Preston R. Padden, INTV, to Dennis R. Patrick, filed in MM Docket No. 85-349 at 3 (June 24, 1986); CR VOL. I.CC, EXH. 176, CR 16568.

KPDX

349. The record indicated that: "KPDX, channel 49, Portland, Oregon, was shifted without notice by two cable systems. Columbia Cable serving Vancouver, Washington, within 35 miles of Portland, shifted KPDX from channel 34 to channel 49 in 1987. Cowlitz cablevision, serving several Washington communities shifted KPDX from channel 20 to channel 36, replacing KPDX with a shopping channel." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 4 9(Sept. 25, 1991); CR VOL. I.K, EXH. 21, CR 08370.

KPTV

350. The record included the following information: "Even long-established, powerhouse Independents like KPTV (channel 12) in Portland encounter channel shifting problems. That station's general manager, Marty Brantley, was so frustrated with TCI's Corvallis, Oregon, system, that he wrote the following to Representative Al Swift: 'In Corvallis, Oregon, TCI relocated all of the Portland channels to an upper tier even though it was in direct violation of the 1980 Corvallis franchise agreement. The base rate was also increased from $6.05 per subscriber to $15.45! The city threatened to sue TCI, and only after a very acrimonious meeting did TCI agree to put the three network affiliates back on their original call numbers. They did not put KPTV back, in spite of the fact that 70% of the population, over 1,300,000 sets, view us per week in that area. We have served the Corvallis area for over 35 years. After much conversation and political pressure, TCI has moved us back to our asigned number. In addition to the above frustrations, channel 12 has been moved to channel 24 by TCI in Lebanon, Oregon and replaced with TCI's American Movie Classics; to channel 24 in Sweet Home, Oregon by TCI and replaced by American Movie Classics; to channel 26 in Eugene, Oregon by TCI and replaced by American Movie Classics.'" Source: Comments of the NAPTS and PBS, in MM Docket No. 88-138 at 5 (July 8, 1988) ("Free Television Under Seige," INTV (May 1988)); CR VOL. I.K, EXH. 21, CR 08558.

KRIV

351. The record indicated that: "KRIV is the Fox owned and operated station in Houston, TX. It is a very strong Independent station which carries the first run programming of the Fox Program Service. In the last year, KRIV has been rooted out of channel positions in the VHF band and relocated on various UHF channel

positions on cable systems throughout its market. Some cable operations have placed KRIV 'on channel' on channel 26. Others have placed it on channel 29 or 30. All of these high number channel positions place the station at a great disadvantage since many consumers' television sets without converter boxes cannot receive the station via cable." Source: Comments of the NAPTS and PBS, in MM Docket No. 88-138 at 5 (July 8, 1988) ("Free Television Under Seige," INTV (May 1988)); CR VOL. I.K, EXH. 21, CR 08558-59.

KSCH

352. The record included the following: "KSCH-TV, channel 58, Rancho Cordova, California, although carried by several cable systems, has been denied carriage by four separate cable systems. Sammons Communications in Turlock, California, has been in touch with KSCH since 1985 regarding the possibility of carriage. As it now stands, Sammons has stated that there is not enough room on their cable system to carry KSCH at the present time. Storer Cable Communications in Fairfield, California, also refuses to carry KSCH on their system. Although KSCH qualities for mandatory carriage on the system, Storer is now claiming that their system has no room for KSCH. Televents of East County in Brentwood, California, also has refused to carry KSCH on their system. Although the cable company has not flatly refused to carry the station at this juncture, they are moving extremely slowly in notifying the station with a final answer to their request. UA Cablesystems in Vacaville, California, has flatly refused to carry KSCH. UA has dragged KSCH on for over five years on the issue of carriage, never really giving them an answer, only leading them on with illusory promises. As it stands, KSCH has had a great number of communications with UA over the past five years but has not come one step closer to carriage." Source: Comments of the Association of Independent

Television Stations, Inc. in M.M. Docket No. 90-4 at 9 (Sept. 25, 1991) (Exhibit B); CR VOL. I.K, EXH 21, CR 08459.

KSCI

353. The record indicated that: "KSCI, channel 18, San Bernandino, California, a minority owned station that provides interlingual programming, has been deleted by two cable systems. Southland Cablevision in Redlands, California, which is within 35 miles of the station, deleted KSCI after four years of constant carriage without offering any notice, allowing any negotiations, or giving any explanation. Multivision in Anaheim, California, also within 35 miles of the station, deleted KSCI as well. The station has been carried by Multivision for over four years. The station was given no notice of the deletion, allowed no negotiations, and the only explanation was that a mail survey done by Multivision indicated that it would be to their advantage to delete KSCI." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 11 (Sept. 25, 1991) (Exhibit B); CR VOL. I.K, EXH. 21, CR 08461.

KSBH

354. The record included the following: "Another example involves the Kansas City market. ATC is the biggest and most important cable system in Kansas City, Missouri. In October of 1988, it embarked on a policy of channel shifting that confused the public and prevented signals from reaching many viewers. For whatever reasons, ATC repositioned *all* local broadcast stations in Kansas City. The three VHF network affiliates were all moved off-channel after three years of being carried on-channel. KSBH-TV, Ch. 41, which for years had been carried on channel 3, was moved to channel 33. The local Kansas City stations were moved around to make room for cable program service on which ATC sold advertising

and had an ownership interest." Source: "Hearings on Cable Television Regulation" at 879 (Statement of James B. Hedlund); CR VOL. I.J, EXH. 18, CR 07883.

KSTS

355. The record included the following information: "Television station KSTS, Channel 48, serves the Spanish-speaking population of the San Francisco-San Jose market. KSTS's goal is to provide the area's growing Hispanic population with quality alternative Spanish language programming, including local news, information and public affairs programs. This is consistent with the FCC's goal of fostering diversity in programming to serve the needs of ethnic and minority communities. Recently, KSTS was dropped from United Cable's system in Hayward, San Leandro, and San Lorenzo, California, an area that is about 20% Hispanic. United added two home shopping channels, among others, in which it has an equity interest. United has also announced a planned channel capacity expansion. From 34 to 60 channels, but does not intend to restore carriage of KSTS." Source: Reply Comments of the National Association of Broadcasters, Appendices, in MM Docket No. 89-600 at 1 (April 2, 1990) (Letter from Paul Niedermeyer); CR VOL. I.X, EXH. 119, CR 12543.

KTIE

356. The record included the following information from the Affidavit of Donald Sterling, President of KTIE:

> "1. Our 15 person news department produces a one-half hour news program seven days a week, including local news, local sports, local weather, local guests. Additionally, we produce one hour per day of a local interview-call in show featuring local guests from all walks of life. We also produce a one-half hour weekly program directed to the senior citizens of the community; a one-half hour weekly program

> produced in conjunction with our local police department; [etc.] . . .
>
> 3. The importance of cable carriage to the survival of KTIE-TV cannot be overemphasized. Ventura County is bounded on three sides by mountain ranges and the balance by the Pacific Ocean. Therefore, the county is heavily cabled. In an area of just over 285,000 TV households (including Santa Barbara), there are twelve cable systems with a total of over 205,000 subscribers—a penetration of 72%. Virtually all of the households that subscribe to cable do not have antennas.
>
> 5. Until the Quincy decision, [Cox Cable of Santa Barbara, approximately 35 miles to our north] had indicated that it intended to carry KTIE pursuant to the must carry rules. After the court decision, Cox reversed its position and has refused to carry KTIE at all, even though KTIE would be the system's only independent station in the Santa Barbara-Ventura county market. Due to terrain characteristics, the Santa Barbara market has the highest cable penetration in the nation—88%. Since without cable KTIE is not seen in Santa Barbara, we lose its 65,000 subscriber households which represent over 22% of the total potential television households in our market.
>
> 6. Jones intercable is the cable system for Oxnard, KTIE's city of license. In fact, its facility is located adjacent to ours. Jones has increasingly emphasized selling advertising time on its cable channels (*i.e.*, MTV, ESPN, CNN, etc.) as well as on its local access channel. They look upon us as direct competitors for local advertisers. While Jones has carried KTIE on basic tier to date (channel 12), we understand that effective January 1, 1987, Jones will move KTIE to channel 54 on its premium priced tier. Thus, KTIE will not be viewable by approxi-

mately 40% of the viewers *in our own city of license* —unless the FCC's new rules go into effect on January 15, 1986, as scheduled.

7. In Oxnard's neighboring city, Ventura, its two cable systems have relegated KTIE to their premium priced tiers. . . . As a consequence, less than one-half of their subscribers can receive KTIE. The combination of Cox Cable's refusal to carry KTIE at all, and the placement of KTIE on the premium prices tiers of the two Ventury systems (Avenue and Century) results in a loss of viewers to KTIE of approximately 75,000 households, over 36% of cable subscribers and 26% of total TV households."

8. It is virtually impossible for a small, local TV station to become a viable, profitable operation with such a major portion of its market denied to it . . . There is no question that we would not have undertaken the construction of KTIE and committed most of our personal finances to it had we anticipated that cable must carry protection might be withdrawn.

9. The effects of cable non-carriage have been devastating. Due to reduced viewership, we have been at a distinct disadvantage in selling advertising time. Our major direct competitior for local advertising is the Santa Barbara ABC affiliate, KEYT. KEYT is carried on every cable system in Santa Barbara and Ventura County on basic tier. Consequently, our marketing efforts have been seriously impaired. We have been forced to invest additional funds at the rate of $200,000 per month to keep KTIE on the air. During the past ten months ended October 31, 1986, KTIE suffered losses of $1,900,000. There is no question that these losses would have been significantly reduced were we to have been carried on basic tier by all cable systems within our service area, as we would under the new FCC must carry rules.

10. Obviously, KTIE cannot continue to absorb such devastating financial lossees and remain long on the air. KTIE is absolutely depending on the effectiveness of the FCC's new rules on January 15, 1987. *I can state categorically and with near-certainty that if these rules are stayed pending a protracted court appeal, KTIE will be forced to go off the air within a very few months.*"

Source: National Association of Broadcasters and INTV's Joint Opposition to Joint Motion for Stay in MM Docket No. 85-349 at 1-4 (Dec. 17, 1986) (Affidavit of Donald Sterling) (emphasis in original); CR VOL. I.DD, EXH. 182, CR 16712-15.

357. The following information was also in the record: KTIE's intention is "to broadcast our news simultaneously in English and Spanish to serve the approximately 30% of our potential viewers who speak Spanish. . . . Virtually all of the households that subscribe to cable do not have antennas, as they became unnecessary as long as local stations are carried on cable, as well as unsightly. Consequently, all cable households must be able to receive station KTIE-TV on cable or they will probably not receive it at all. . . . [J]ust since the release of the Court's [must-carry] decision, two systems representing approximately 30% of our total potential market have specifically refused to carry KTIE-TV—Group W and Cox. It is almost impossible for a small, local TV station to become a viable, profitable operation with such a major portion of its market denied to it . . ." Source: Comments of the Motion Picture Association of America, Inc. in MM Docket No. 85-349 at 1 (Jan. 9, 1986) (Affidavit of Donald Sterling); CR VOL. I.AA, EXH. 151, CR 15589. *See also* Joint Comments of Metropolitan Board of Education, Long Island Educational Television Council, Metropolitan Pittsburgh Public Broadcasting Inc., and Santa Barbara Board of Education in MM Docket 85-349

at 1-2 (April 25, 1986); Comments of the National Association of Broadcasters, Appendix Volume, in MM Docket No. 88-138 at 2-5 (July 8, 1988) (Statement of Donald Sterling); CR VOL. I.Y, EXH. 128, CR 14642-43.

358. The following information was also in the record: "KTIE-TV, Oxnard, California, a UHF independent which is Ventura County's first and only local television outlet, has responded to the needs of its local audience with, among other things, a 15-person local news department, two half-hours of live local news programs daily, a live electronic news-gathering (ENG) unit, two weekly local public affairs programs, and a live local children's science and entertainment show (with local children in the studio audience) daily. Due to mountainous terrain, 72.5% of Ventura County's television households subscribe to cable. Two cable systems in KTIE's viewing area, accounting for almost 30% of the total households in its market, have refused to carry KTIE, notwithstanding the local public's apparent wishes, as reflected in a local newspaper editorial (*see* Attachment F hereto). Two other local cable systems carry KTIE only on premium tiers. As one local cable operator stated with reference to KTIE, 'Without cable's cooperation, they won't survive.'" Source: Comments of Association of Independent Television Stations, Inc. in MM Docket No. 85-349 (Jan. 29, 1986) at 64-65 (citing *Cable TV Franchising*, Dec. 23, 1985 at 3); CR VOL. I.BB, EXH. 162, CR 15892-93.

KTSF

359. The record indicated that: "KTSF was dropped by the TCI systems in Sunnyvale and San Mateo on December 23, 1986. At that time the Asian population was 16% in Sunnyvale and 8% in San Mateo. Other local stations were also dropped at the same time. All of the replacement programming was made-for-cable pro-

gram services. In this instance, in contrast to the Millbrae system (discussed below), TCI has been unresponsive to expressions of preference for KTSF from viewers and community organizations, and to requests from elected officials that the action be reconsidered. TCI cited a subscriber survey as justification for dropping KTSF, but has conceded that it was done only in English, effectively eliminating any response from the station's core audiences. The system promised to do another survey, this time multilingual, within six months, but that survey has yet to be done to Lincoln's knowledge." Source: "Hearings on Must Carry" at 166-67 (statement of Brian G. Holton); CR VOL. I.F, EXH. 12, CR 04176-77.

KTVD

360. The record indicated that: "KTVD, Channel 20, is licensed to Denver, Colorado. Net Link a satellite service which distributes the signals of Denver stations to cable systems in the mountainous terrain with the Denver and its ADI, is willing to add KTVD to its system at a cost of $85,000 per month. Other Denver stations currently on Net Link are carried without charge. Consequently, 35% of the cable systems in the Denver ADI do not carry KTVD." Source: Comments of the Association of Independent Television Stations, Inc. in MM Docket No. 89-600 at 49 (March 1, 1990); CR VOL. I.U, EXH. 107, CR 12615.

KTVI

361. The record included information that KTVI in St. Louis, Missouri was "replaced on a Sammons Communications cable system by CNN from which Sammons receives 25% of the gross sales made by the company selling local ads on the system." Source: Reply Comments of the National Association of Broadcasters, in MM Docket No. 88-138 at 3 (Aug. 8, 1988); CR VOL. I.Z, EXH. 143, CR 15364.

KTVU & KBHK

362. The record included the following information:

"In late November, 1986, TCI notified the San Francisco area Independent stations of its plans to shift their channel locations. TCI claimed its move was based on a 'comprehensive survey of subscriber attitudes' and was intended to 'provide the most popular services on the first twelve cable channels.' KTVU—which broadcast on channel #2—and KBHK—which broadcasts on channel #44 but has been carried on channel #12 for over 20 years—were to be repositioned in the upper end of the cable dial. Other Bay area Independents were to suffer a similar fate.

Even though KTVU and KBHK are the highly-rated #1 and #2 Independents in this, the 4th largest television market in the country, TCI planned to move them out of the first twelve cable channels. In their place TCI planned to substitute cable services on which it sold advertising and—in several instances—in which TCI held an ownership position.

Although TCI temporarily postponed the relocation of KTVU, it nonetheless went ahead with the shift of KBHK. TCI, incidentally, does not provide free converters for additional set hook-ups, meaning that KBHK is *not* available on thousands of sets hooked to TCI's cables."

Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket 90-4 at 9 (Sept. 25, 1991) ("Free Television Under Seige", INTV (May 1988)); CR VOL. I.K, EXH. 21, CR 08563.

KTXL

363. The record indicated that: "KTXL, channel 40, Sacramento, California, has been deleted from 19 cable systems. Only two cable systems gave the station any

notice of the deletion and even then the station had less than a month. None of the companies allowed negotiations, and only three gave some sort of explanation. The only two different explanations offered were that either the signal was not strong enough and gave bad reception or that the system was full and the station was to be replaced by another station. The cable systems that deleted KTXL were Bay Cablevision-El Cerrito, Bay Cablevision-Hercules, Coastside Cable, El Portal Community TV System, Feather River Cable, TCI-Fremont, Gil Cable, Northstar Cable-Group W, Pacifica Cable Company, TCI-Millbrae, TCI-San Mateo, TCI-Peninsula, Continental Cablevision, Lencom Bay Cablevision-Berkeley, Lencom Bay Cablevision-El Sobrante, TCI-Sunnyvale, United Cable of Bay Area and Vista Grande Cablevision, all in California. The last company to delete KTXL was TCI Cablevision of Reno, Nevada." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 11-12 (Sept. 25, 1991) (Exhibit B); CR VOL. I.K, EXH. 21, CR 08461-62.

KUSK

364. The record indicated that: "KUSK-TV, Channel 7, Prescott, Arizona, was dropped by Warner Cable in Flagstaff on April 1, 1991, after carriage on channel 7 since 1984." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 52 (Sept. 25, 1991); CR VOL. I.K, EXH. 21, CR 08373.

KUTF

365. The record indicated that: "Station KUTF, channel 32, Portland, Oregon, has been denied service by 20 different cable companies after beginning operation in May 1989. Northland Cable Television from Woodburn, Oregon carried the station for one week. During that week the station was off for two days, and after that the station was deleted. Northland Cable has of-

fered on explanation for the deletion of KUTF." Source. Comments of the Association of Independent Television Stations, Inc. M.M. Docket No. 90-4 at 5 (Sept. 25, 1991) (Exhibit B); CR VOL. I.K, EXH. 21, CR 08455.

KVEW

366. The record indicated: "Until recently, the three local, network affiliates (including satellite station KVEW-TV) were carried by the cable system on channels 2-13. Specifically, KVEW was on channel 12, KEPR-TV (CBS) was on channel 7, and KNDU-TV (NBS) was on channel 11. The public station, a satellite of KWSU-TV, Pullman, WA, was carried on channel 10. On December 28, 1989, a letter from Columbia Cable was hand delivered to my office in Kennewick. This letter, (copy attached), indicates that on January 1, 1990 all over-the-air stations carried by the cable system will be moved to their FCC assigned channel numbers. In the case of KVEW, this meant a move from channel 12 to channel 42. The cable system currently operates 50 channels. Channel 42, is a number which is so high on the band that many viewers are unable to receive it. Older sets which require a converter box, or cable-ready sets and VCR's with limited channel range can't receive channel 42 at all. Columbia Channel has offered to provide one converter box per household at no charge for a period of five years. After that time there will be a charge. Subscribers with multiple cable hook-ups will have to rent a converter box to receive higher channels on additional sets." Source: Comments of the 97 Television Stations in MM Docket No. 89-600 at 1-2 (March 1, 1990) (Exhibit 4: Affidavit of H. Darrell Blue); CR VOL. I.S, EXH 100, CR 12029-30.

KVOS

367. The record included the following information: "KVOS-TV, channel 12, Bellingham, Washington, was dropped by Viacom Cable in Snohomish County, Washington. The station reports: 'The results were that we lost service to 30,000 viewers who fall within our Grade B coverage. Most of these former viewers live in locales where the terrain prevents adequate over-the-air reception of KVOS-TV. They also live in an area where there is no cable competitor.' " Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 51-52 (Sept. 25, 1991); CR VOL. I.K, EXH 21, CR 08372.

KWBI

368. The record included the following: "Having been denied cable carriage on all Denver area cable systems, KWBI states that: since commencing operations in 1988, it has continuosly encountered deficits; that 'there is no other factor more important to the viability of this station than cable carriage'; and that it is in a 'survival mode' and will probably go dark if local carriage is not obtained in the next two years." Source: Reply Comments of the National Association of Broadcasters in MM Docket No. 90-4 at 17-18 (October 25, 1991) (citing Comments of KWBI at 2, 7, 8); CR VOL. I.Q, EXH. 80, CR 11346-47.

KWHB

369. The record included the following information: "For the past two years, Lesea has owned KWHB, a full-power UHF station in Tulsa. We're an independent, commercial station. Our programming is religious and family-oriented. We've invested $5 million dollars in KWHB. Due to our lack of cable carriage by Tulsa Cable, our losses average $50,000+ per month. KWHB has made many attempts to obtain cable carriage. We've met numerous times with Mark Savage, president of Tulsa Cable. We've sought the help of the FCC. We even went so far as to offer to lease a channel from Tulsa Cable. In spite of all our efforts, we're still not carried on cable. This past Friday, we made one more attempt. We took lack

of cable carriage before the Tulsa city government. I've enclosed a VHS copy of the presentation I made to the Tulsa mayor and city commissioners asking their help in this matter. . . . KWHB is a textbook example of what happens without cable carriage. We're denied access to 50% of the audience while we lose tens of thousands of dollars each month." Source: Comments of the National Association of Broadcasters, Appendix Volume, in MM Docket No. 88-138 at 1 (July 8, 1988) (Letter from Steve Morgan); CR VOL. I.Y, EXH 128, CR 15023.

370. The record also included the following information about KWHB:

> 8. "The following clients are examples of those that have discontinued either their programming or advertising with KWHB-TV, but now purchase time only on Tulsa Cable and other local broadcast stations with carriage on the Tulsa Cable system: (1) Higher Dimensions Evangelistic Center; (2) Yvonne Nance's 'Water of Life' program; (3) Jerry Falwell; (3) Tregoning Chiropractic; (4) the 'Today, the Bible and You' program; and (5) Mazzio's Pizza.
>
> 9. Tulsa Cable, a direct competitor with KWHB-TV for programmers and advertisers, is exercising its power as a monopoly (the sole cable system) to gain a competitive advantage over KWHB-TV by denying KWHB-TV access to the cable subscriber audience in Tulsa, Oklahoma. Tulsa Cable, by completely denying KWHB-TV cable carriage and providing full-time carriage to most of KWHB-TV's broadcast television competitors, has made KWHB-TV the least effective station for advertisers and programmers. Moreover, Tulsa Cable has effectively placed a low ceiling on the rates KWHB-TV can charge advertisers and programmers. KWHB-TV cannot obtain the same compensation from programmers and advertisers as other local television stations obtain, because KWHB-TV cannot offer advertisers and programmers access to cable-only television households.
>
> 10. The following local advertisers or programmers noted that KWHB-TV is not carried on the Tulsa Cable system when explaining their decisions not to purchase time on KWHB-TV: (1) First Methodist Chuch; (2) Gracemont Baptist Church; (3) Robertson Tire Company; (4) Spartan School of Aeronautics; (5) Climate Control Institute; (6) Tulsa Chiropractic Association; (7) Medi-Serv; (8) Choice Smorgasbord; (9) Lanham Furniture; (10) Leather Forever; (11) 700 Club; (12) Apple Homes; (13) Marilyn Hickey; (14) Advanced Advertising; (15) Advertising Techniques; and (16) O'Neill & Associates."

Source: Comments of LeSEA Broadcasting, in MM Docket No. 88-138 at 2-4 (July 8, 1988) (Declaration of Peter Sumirall); CR VOL. I.Z, EXH 141, CR 15334-35.

371. The following information was also in the record: "KWHB-TV, Channel 47, is licensed to Tulsa, Oklahoma. United's cable's system in Tulsa and TCI Cablevision of Oklahoma together have 185,000 subscribers, but do not carry the station." Source: Comments of the Association of Independent Television Stations, Inc. in MM Docket No. 89-600 at 47 (March 1, 1990); CR VOL. I.U, EXH. 107, CR 12615.

KWHD

372. The record included the following:

> "KWHD commenced broadcast operations on July 1, 1990, with an effective radiated power of 2.3 million watts and now operates with an effective radiated power of 5 million watts. KWHD is not carried *on any* cable system in the Denver ADI, including its community of license. A.C. Nielsen estimates that the Denver market has 1,054,000 television house-

holds, 54% of which (approximately 566,000) have cable. KWHD has contacted each cable system in the market seeking carriage, thus far without any success. Indeed, to fourteen of these systems having 424,000 estimated total subscribers, KWHD has agreed to offer, at no charge to the cable system: 1) all equipment needed to receive the KWHD signal, 2) cross-promotion of the cable system, 3) to print new channel line-up cards, 4) to work with the cable system in obtaining new subscribers, and 5) to broadcast thank-you 'announcements' to the cable system for carrying KWHD. Five of the cable systems never responded to KWHD's offer. Several other systems responded that they had no interest in carrying KWHD, while others responded that they were not adding any *broadcast* stations at this time. One system responded that KWHD has a weak signal, despite engineering reports which showed a strong signal.

KWHD broadcasts a mix of religious and entertainment programming. This includes approximately five hours of locally produced religious programs, and a weekly local public affairs program. It also plans shortly to begin broadcasts of high school and other local sports. Several cable systems have indicated to LeSEA management that they would not carry KWHD because it presented direct competition to Vision Interfaith Network (VISN), a satellite-delivered religious program channel in which they have a financial interest. This included the largest cable system in the Denver market, United Artists Cable (approximately 160,000 subscribers, and Jones Intercable (approximately 42,000 subscribers).

When the station attempts to sell advertising or program time, potential clients repeatedly indicate that they would advertise or purchase time on the station if it were on cable. Distributors of syndicated barter programming have also stated that be-

cause KWHD is not on cable they are un-willing to make programming available to it. Daily newspapers do not include KWHD in their TV listings because of the lack of cable carriage. This is also true for *TV Guide* magazine."

Source: Comments of LeSEA Broadcasting Corporation, in MM Docket No. 94-4 at 3-4 (Sept. 25, 1991); CR VOL. I.P, EXH. 65, CR 10831-32.

KWHE

373. The following information about KWHE was in the record:

> "We own television stations in eight cities and in seven we have a cable problem in the form of unfair competition. Our stations, we believe, follow closer to the guidelines of community programming than most other stations. We are a not for profit religious organization that produces and broadcasts community interest programming, local sports and religious programming. In each instance we have been directly told by cable programming directors, local managers and corporate managers that our stations are competition for local origination channels and they do not want the competition of a broadcast station on the system that competes for this segment. These actions have effectively cut us off from over half of the population that we are licensed to cover (in some cases in Hawaii upwards of 80 and 90% of some communities are cabled). In two markets over 4,000 miles from each other where the systems are owned by the same MSO, our local managers were told that the MSO had a corporate policy against carriage of stations with programming such as we have because they support a satellite service with similar programming unless the local station produced locally 50% of our programming. This is impossible for any local station, much less one in

a small market. We have also been told by the same managers that the MSO's have a policy against any station that airs programming or does fund-raising itself as a primary method of staying on the air. Why is this their concern? Why should they have the right to limit our access to the community simply because they do not like the way we have been able to solicit support of the people who like any station that did not have to purchase programming, in other words they did not like any station who sold program time to religious programmers. This is censorship of the highest degree.

We also air family programming such as Wonderful World of Disney, Waltons, etc. Cable managers reaction to this has been, 'more reruns, I can get this from several satellite sources.' We also produce local high school sports and again in at least four markets we have been told that this is in direct competition with the cable system locally producing their own high school sports and they were not interested in any additional games."

Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 6-7 (Sept. 25, 1991) (Exhibit C); CR VOL. I.K, EXH. 21, CR 08469-70. *See also* Comments of LeSEA Broadcasting Corporation, in MM Docket No. 90-4 at 15-17 (Sept. 25, 1991); CR VOL. I.P, EXH. 65, CR 10843-44.

KZKC

374. The following information was in the record: "KZKC-TV, channel 62, Kansas City, Missouri, was shifted from channel 7 to channel 4. Although this may not sound like that dramatic a change, cable 4 was not in use before KZKC was switched there because WDAF, a local channel, interfered with cable 4, making the cable pictures distorted and snowy. The cable company, Jones, gave no notice of the shift, would not discuss the switch

with the station and offered no explanation for the shift. The shift caused channel 62's signal to be distorted and snowy resulting in viewer complaints and reduced audiences." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 4 (Sept. 25, 1991) (Exhibit B); CR VOL. I.K, EXH. 21, CR 08454.

WAAP

375. The record included the following: "A similar illustration exists in WAAP, Burlington, North Carolina. The station began operation in 1984 and is the only station licensed to Burlington. The stations is in financial straits largely because 11 cable systems consisting of 65% of the cable households in the market have refused to carry the station's signal. The station produces and broadcasts live local news twice daily each weekday. Yet, the cable system in its community of license provides access to the station only via an A/B switch, rather than on the basic tier." Source: Reply Comments of the Association of Independent Television Stations, Inc. in MM Docket No. 90-4 at 18 (Oct. 25, 1991); CR VOL. I.Q, EXH. 81, CR 11376.

WACX

376. The record indicated that: "WACX, channel 55, Orlando, Florida, has been shifted by three cable companies and deleted by three. Cox Cable in Ocala, Florida, shifted the station from a low band VHF to channel 27. Lake County Cablevision in Leesburg, Florida, shifted the station from low band VHF to channel 28. Telcom Cable TV shifted the station from a low band VHF to channel 23. All three of the cable companies offered no explanation for the shift, and two of the companies were going to drop the station altogether, but decided to only shift after negotiations with the station. Friendship Cable TV in Anthony, Florida, deleted WACX. There was no notice of the delegation given to the station, and although friendship has not responded,

WACX has attempted to contact them to conduct negotiations since the time of the deletion. WACX has gone as far as to offer to buy the equipment needed for carriage. ATC Cablevision in Orlando also deleted WACX. In a situation much the same as that with Friendship, WACX is still attempting unsuccessfully, to negotiate a deal to get themselves carried once again." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 8 (Sept. 25, 1991) (Exhibit B); CR VOL. I.K, EXH. 21, CR 08458.

WAWA

377. The record indicated that: "WAWA-TV started up in early 1988 with a very expensive and elaborate television service for Rome and the surrounding area. However, the cable system in Cartersville, only 22 miles away, refuses to carry the station. Indeed, the operator said there was 'no way' WAWA was going to be carried in Cartersville. It appears that the reason for this reaction is that the cable operator sells local advertising on certain cable channels, and does not want a competitor in its market. The station even offered to let the cable operator sell spots for it in Cartersville, but that offer was refused as well." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 9 (Sept. 25, 1991) ("Free Television Under Siege", INTV (May 1988); CR VOL. I.K, EXH. 21, CR 08563.

WAYK

378. The following information was in the record regarding WAYK: "WAYK, channel 56, Melbourne, Florida, and WAYQ, channel 26, Daytona Beach, began operations in March, 1986, and September, 1988, respectively. They are commonly-owned. In early 1990, the owners reported: 'We are close to bankruptcy and going dark. . . [W]e have not gained access to Cablevision of central Florida, 170,000 subscribers in Orlando, Orange,

Seminole, and Osceola Counties. . . . We are on part time now.'" Source: Reply Comments of the Association of Independent Television Stations, Inc. in MM Docket No. 90-4 at 50 (Oct. 25, 1991); CR VOL. I.Q, EXH. 81, CR 08371.

379. The record also indicated: "WAYK has had nothing but trouble with area cable systems since it signed-on in June 1986. Particularly troublesome has been ATC—the nation's second largest cable MSO—which operates systems in Melbourne (WAYK's city of license) and in Orlando, the major city in the market. Even though WAYK has two daily local newscasts and schedules 250 major league baseball games each season, ATC charged the station $35,000 to gain access to Melbourne cable subscribers. To date ATC has denied the station access to Orlando subscribers, although it has suggested that for $1 million it might change its mind. Although WAYK's baseball schedule is extremely popular, ATC views the station as unwanted competition since the cable operator has its own 100 game baseball package on which it sells local advertising." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 9-10 (Sept. 25, 1991) ("Free Television Under Siege", INTV (May 1988)); CR VOL. I.K, EXH. 21, CR 08563-64.

380. The following information about WAYK was also in the record: "WAYK is licensed to Melbourne, Florida. WAYQ is licensed to Daytona Beach, Florida, and is a satellite of WAYK. Neither of these stations is carried on other than on a part time basis by the primary cable system in the market, Cablevision of Central Florida (298,000 subscribers), which serves Orlando, Orange, Seminole and Osceola counties." Source: Comments of the Association of Independent Television Stations, Inc. in MM Docket No. 89-600 at 49 (March 1, 1990); CR VOL. I.U, EXH. 107, CR 12615.

WBGU

381. The record indicated that: "WBGU-57 (PBS), Bowling Green, OH, Duane Tucker, 'Van Wert switched us from channel 12 to 30 without any notice. Big problem is trying to find out what is going on. Our best information we get is from our viewers who write when they notice an unfavorable change. Buckeye Cable changed us to a superband where you can't get us unless you have a cable ready television set. No notice was given, but upon request—we were told we were dropped in favor of the Home Shopping Network for economic reasons.' 1 system dropped (1000,000 subs/within 50 miles/viewing N/A)." Source: Comments of the National Association of Broadcasters, Appendix Volume, in MM Docket No. 88-138 at 1 (July 8, 1988) (WBGU-57 (PBS)); CR VOL. I.Y, EXH. 128, CR 14989.

WCAJ

382. The following information was in the record: "WCAJ, channel 68, Birmingham, Alabama, has been deleted by two cable companies. ATC Cable in Birmingham shifted WCAJ from 27 to 28 back to 27, then they cancelled WCAJ altogether. Although the station attempted to negotiate with the station, the only agreement reached, 50 cents per subscriber for five years, was not economically feasible. Mt. Brook/Shelby County in Alabama also deleted WCAJ. In this case, no notice was given of the deletion, the cable company would not negotiate with the station, and no explanation given for the deletion." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 7 (Sept. 25, 1991) (Exhibit B); CR VOL. I.K, EXH 21, CR 08457.

383. The record also indicated: "WCAJ, Channel 68, is licensed to Birmingham, Alabama. The station began operation on January 31, 1986. Effective November 1

1989, the station was dropped by the ATC cable system serving Birmingham and immediately surrounding communities. The station's signal was replaced by the Comedy Channel. The system has 71,600 subscribers." Source: Comments of the Association of Independent Television Stations, Inc. in MM Docket No. 89-600 at 50 (March 1, 1990); CR VOL. I.U, EXH. 107, CR 12616.

WCBB

384. The following information was in the record: "WCBB-10 (PBS), Portland, ME, H. Odell Skinner, 'No warning and no explanation was given any of the times we were dropped. We lost at least 537 contributing members. We've been dropped by over ten systems, maybe thirteen.' 5 or more systems dropped (50,000 subs/within 50 miles/meets viewing)." Source: Comments of the National Association of Broadcasters, Appendix Volume, in MM Docket No. 88-138 at 1 (July 8, 1988) (WCBB-10 (PBS)); CR. VOL. I.Y, EXH. 128, CR 14994.

WCOM

385. The record included the following information:

"I represent the investors and the financial institutions who financed the construction and operation of WCOM-TV in Mansfield, OH, a small market UHF station that began to air in February of 1988 and subsequently went dark in June of 1989. The station's original date of air was just two weeks after the must-carry rules were rescinded in February of 1988, but after an investment of $3 million had already been made to build the technical facility for the station.

WCOM-TV exerted every effort, throughout the entire period that it was on air, to gain cable carriage from the approximately 82 systems within it's grade B contour but was never able to clear carriage on

more than 12 systems representing only approximately 48,000 TV households. As a result, the advertising community within that area considered the station 'invisible' and a poor advertising investment.

The station's technical facility included a 1600 foot tower and 2½ million watt transmitter so that WCOM-TV could to provide service to a number of smaller communities in Central Ohio that do not receive local programming and news attention from the stations in the larger adjacent markets of Columbus and Cleveland. We saw a tremendous opportunity to provide local scervice to, at minimum, the approximately 300,000 homes in these smaller communities who, additionally, are not provided local service from the approximately 70 cable systems 'serving' this same area.

During the approximately 16 months the station remained on the air, absolutely every cable operator within 50 miles of our city of license was contacted (begged) to carry the station. We had worked hard to assure that virtually none of the programming carried by WCOM-TV was duplicated by stations in either of Cleveland or Columbus so WCOM-TV would be considered totally unique.

Unable to clear but a fraction of the cable systems in the area, the station finally 'bled' to death. The station's primary service area is approximately 70% cable penetrated and, as noted in the Second Further Notice, cable subscribers do not have antennas with which to watch over-the-air TV. WCOM-TV was, therefore, effectively invisible, and unable, as a result, to generate enough advertising support to keep the station on the air."

Source: Comments of George E. Coles, President, WCOM-TV, Columbus, Ohio, in MM Docket No. 90-4 at 1-2 (Sept. 24, 1991); CR VOL. I.P, EXH. 61, CR 10764-65.

WCOV

386. The record included the following information about WCOV-TV in Montgomery, Alabama: " 'We were recently removed from the cable system in Auburn, Alabama. This system had carried WCOV for 10 years. Auburn is a University town 50 miles from Montgomery. Many of our residents attend school there. In the past, they were able to watch their hometown television station. But no more, because the cable operator decided to take us off. This system represented 8% of our entire cable households. In our place, they added another cable channel. Within one month, our largest department store —Gayfers, cancelled a &3,000 per month contract because we no longer served their Auburn stores. This is a great deal of revenue for us to forfeit—all because a cable operator decide to drop us.' " Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 2 (Sept. 25, 1991) (Exhibit C); CR VOL. I.K, EXH. 21, 08465.

WCVX

387. The record included the following: "WCVX-TV, Vineyard Haven (Cape Cod), Massachusetts, is another UHF independent which is the only local station in that area. 10 of the 11 cable systems in WCVX's service area, representing 96.2% of its total potential audience, have refused to carry its signal." Source: Comments of Association of Independent Television Stations, Inc. in MM Docket No. 85-349 at 65 (Jan. 29, 1986); CR. VOL. I.BB, EXH. 162, CR 15893.

388. The record also indicated that:

"Approximately 18% of WCVX's programming is locally produced and WCVX hopes ultimately to originate 30% of its programming locally. WCVX is the only source of truly local, over-the-air TV programming in the Cape Cod/Martha's Vineyard/Nantucket area, and is available

without cost to all residents in the area. Yet local cable systems, with one exception, will not carry WCVX." Source: Reply Comments of the National Association of Broadcasters, Appendices, in MM Docket No. 89-600 at 14 (April 2, 1990) (Comments of Cape Video Network (Jan. 29, 1986)); CR VOL. I.X, EXH. 119, CR 14307.

389. The following information was also in the record:

> "July 19, 1995 was the day WCVX commenced operation as a full power station. This was also the same day the U.S. Court of Appeals released its decision vacating the FCC's 'must carry' rules. From the outset, the station was faced with a severe handicap. Cape Cod and the Islands are heavily cabled. The demise of 'must carry' resulted in the loss of carriage on 14 cable systems, representing approximately 115,000 subscribers. Because the largest cable operator in the area was doing a news program and aggressively selling advertising at a very low rate, they deemed it inappropriate to put WCVX on their system. To compound the economic woes of the station, most of areas served by the station are in the Providence of Boston A.D.I., thereby severely hampering efforts to sell national and regional advertising and impairing the stations ability to purchase first-rate programming.
>
> Through William Cotter, limited partner, private monies had been pledged and bank loans secured. On February 9, 1986, Mr. Cotter died, leaving me in debt to his estate, with borrowing abilities from local banks cut in half.
>
> From July 1985 to December 1986, WCVX has incurred operating losses before depreciation in excess of $2,625,500.00.
>
> I have tried to sell the station both privately and through several broadcast station brokers. Due to

> the glut of UHF television stations on the market, since the demise of the 'must carry' rule, all of these attempts failed to bring forth any serious buyers.
>
> The only offer to purchase which I have received has come from a group of local broadcasters, who came forward with a plan which they felt would enable the station to continue broadcasting. After many discussions, the plan was finalized. This group is METRO Television, Inc.
>
> I have been apprised by my lender that unless the proposed sale to Metro Television, Inc. is approved and consumated expeditiously, steps will be taken to foreclose on the loans, which would result in bankruptcy, and the termination of broadcasting by WCVX."

Source: Reply Comments of the National Association of Broadcasters, Appendices, in MM Docket No. 89-600 at 1-2 (April 8, 1990) (Affidavit of Donald P. Moore); CR VOL. I.X, EXH. 119, CR 14288-89.

390. The following information was also in the record:

> "WCVX—Cape Cod's only television station—had the misfortune of signing on July 19, 1985, the day the must-carry rules were invalidated in the *Quincy* case. On January 22, 1988, the station was taken over by its leading creditor. The single largest factor forcing the sale back to the bank, according to the owner, was the station's failure to gain access to the vast majority of the area's cable subscribers.
>
> As of January 1986, WCVX was available to less than 4% of the 200,000 cable subscribers it was licensed to serve. Two years later, 145,000 cable subscribers were still denied access to their only local station. WCVX was not only the Cape's only station, it was one of only two stations within 50

> miles (the other is a Providence/New Bedford network affiliate). From the first day, WCVX sought to serve its viewers with a steady diet of local news (2—30 minute newscasts a day) and local events (extensive coverage of high school sporting events, etc.). Not coincidentally, the largest cable system in the area, the TCI system serving Barnstable County, also produces a local news program and sells commercials in competition with WCVX. TCI let over two years go by before it finally added WCVX to its 35,000 subscriber system in compliance with the Commission's revised must-carry rules."

Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 11 (Sept. 25, 1991) ("Free Television Under Siege," INTV (May 1988)); CR VOL. I.K, EXH 21, CR 08565.

WDBB

391. The record included the following: "WDBB—Tuscaloosa's only Independent station—was understandably upset when Comcast's Tuscaloosa cable system announced its intention to move WDBB from cable channel #12 to channel #17. Since the other local stations were retained on the first twelve channels, WDBB alone was in a position where only cable subscribers with cable-ready sets or able to afford converter boxes could view the station. In response to WDBB's complaint, the general manager of the Comcast system, Kim Kersey, explained that in filling the first twelve channels. . . 'we selected those (services) we felt would drive our business best. Consideration was given to major network programming, viewer popularity of cable networks, subscriber convenience and *potential for local advertising sales*. . .' (emphasis added)." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 11 (Sept. 25, 1991) ("Free Television Under Siege," INTV (May 1988)); CR VOL. I.K, EXH. 21, CR 08565.

392. The record also indicated as follows: "Mr. Kersey replaced WDBB-TV on Channel 12 with USA Network, a cable service upon which he markets local advertising time." Source: Reply Comments of the National Association of Broadcasters, Appendices, in MM Docket No. 89-600 at 1 (April 2, 1990) (Letter from David DuBuse); CR VOL. I.X, EXH. 119, CR 14281.

WDCA

393. The record indicated that: "WDCA-TV, channel 20, Washington, D.C., is carried on channel 40 in Montgomery County, Maryland, one of the biggest and most influential cable systems in the Washington metropolitan area. The station reports: 'Montgomery County Cable has us in Siberia [*i.e.*, placed in a high channel position] and its General Manager refuses to meet with us.'" Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 50 (Sept. 25, 1991); CR VOL. I.K, EXH. 21, CR 08371.

WDCI

394. The record indicated that: "WDSI, channel 61, Chattanooga, Tennessee, has been shifted by two cable companies and deleted by one. Clear-View Cable in Summerville, Georgia, shifted the station from channel 13 to channel 15 without any notice. The shift to the higher tier had a significant impact on the station, which was replaced on the lower tier by the Home Shopping Network. No explanation was given for the move; the only communication from Clear-View was that the station would still be on basic." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 6 (Sept. 25, 1991) (Exhibit B); CR VOL. I.K, EXH. 21, CR 08456.

WDZL

395. The following information was in the record: "WDZL, channel 39, Hollywood, Florida, has been

shifted by six cable systems. Four of the six cable companies have offered no explanation for the shifts. The two that have offered an explanation state only that they wish to have each station on the correct channel. All of the shifts have occurred without notice to the station, and in all six of the shifts the cable companies were unwilling to negotiate the changes. Miami TCI shifted WDZL from channel 10 to 39. Selkirk Cable in Fort Lauderdale shifted the station from channel 14 to 31. Continental Cablevision, which serves areas of Broward County, Florida, shifted the station from channel 18 to 11. Jones Intercable in Davie, Florida, shifted the station from channel 17 to 39. Coral springs Cable TV in Coral Springs, Florida, shifted the station from channel 18 to 39. Storer Cable in North Dade, Florida, shifted the station from channel 12, through several other channels, eventually to 24. Last, Gold Coast Cablevision in Miami Beach, Florida shifted WDZL from channel 36 to 38." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 9 (Sept. 25, 1991) (Exhibit B); CR VOL. I.K, EXH. 21, CR 08459.

WFAT (subsequently WPTJ)

396. The following information about WFAT was in the record:

> "With 40,000 subscribers Harron Cable represented the vast majority of cabled television homes in Westmoreland County and was the largest cable system located within WFAT's coverage area.
>
> The station was forced to sue Harron Cable under the F.C.c.'s must-carry rules in order to gain carriage. The station spent over $40,000 in attorneys fees and twelve months of legal maneuvering before Harron was finally forced to carry the station in July 1985.

> On September 5, 1985, the day the appeals court decided it was not going to overturn an earlier court decision to abolish the must-carry laws WFAT was dropped from the Harron system.
>
> The station had anticipated that Westmoreland County would provide the station with its largest share of advertising revenue due to the fact that it was the only television station of either the Johnstown-Altoona or the adjacent Pittsburgh markets with a transmitter located in Westmoreland County.
>
> Westmoreland County, at that time, was the fastest growing county in the state of Pennsylavnia. It is located on the eastern edge of the Pittsburgh market and most of the local advertisers could not afford advertising on the Pittsburgh television stations. The other two Johnstown-Altoona market stations, WJAC-TV (NBC) and WTAJ (CBS) had largely ignored the Westmoreland County area because Westmoreland is part of the Pittsburgh ADI.
>
> WFAT, however, as an independent station with its excellent coverage of the area had a niche for advertising revenue in Westmoreland County by providing the advertisers located there with a low cost alternative to Pittsburgh's high advertising rates.
>
> Once cable carriage on the Harron system was attained WFAT was able to secure long term advertising contracts which its account executives had been working on over the past year but were unable to close due to the lack of cable carriage.
>
> WFAT had shown a profit during the fourth quarter of 1985 for the first time in ten years (since it lost the ABC affiliation) due to the increased advertising sales it received from Westmoreland County. These sales represented 33% of the station's total income.
>
> The importance of Westmoreland County was exacerbated by the fact that Johnstown, Pennsylvania

had one of the highest rates of unemployment of any city in the United States. Naturally, after WFAT was dropped from the Harron system in September 1985, it was unable to renew contracts with Westmoreland clients due to the lack of cable carriage. I later learned that Harron Cable in early 1985 had been negotiating with Cable Adnet to represent the cable system for local advertising insertion. Cable Adnet to this day still represent Harron Cable (now Marcus Cable-TCI).

WFAT-TV also competed with Johnstown Cable and Altoona's Warner Cable for local advertising revenue since both of these systems were selling advertising locally and inserting advertisements in a variety of different cable channels.

After the loss of Harron Cable WFAT started its decline. From early 1986 through 1990 cable systems started dropping the station or repositioning it to less desirable channel positions.

In 1986 Johnstown Cable (the station's city of license), with 31,500 subscribers, repositioned WFAT from channel 5 to channel 19 on a higher tier. WFAT was unavailable to approximately 13,000 subscribers who did not have the higher tier service.

Later that year WFAT was dropped from Indiana Cablevision. In 1987 Somerset Cable, Highland Cable, among others, dropped the station from their systems. Finally, in April of 1988 WFAT-TV was forced into bankruptcy.

In the Fall of 1989 Warner Cable of Altoona (32,000 subscribers) dropped WPTJ (WFAT call letters were changed) from its system. Altoona is the market's second city.

WPTJ went dark in mid-1990 after being on the air continuously for over thirty years. A bankruptcy

court trustee is currently in the process of liquidating the station's assets."

Source: Comments of Leon A. Crosby, Former Licensee of WPTJ-TV, Johnstown, PA in MM Docket No. 90-4 at 3-4 (Sept. 25, 1991); CR VOL. I.P, EXH. 63, CR 0783-84. *See also* Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 9 (Sept. 25, 1991) (Exhibit B); CR VOL. I.K, EXH. 21, CR 08459; Comments of the National Association of Broadcasters, Appendix Volume, in MM Docket No. 88-138 at 1 (July 8, 1988) (WFAT-19 (IND)); CR VOL. I.Y, EXH. 128, CR 14978.

397. The record included the following: "I am Leon A. Crosby, the former licensee of WPTJ-TV (formerly WFAT, WJNL, WARD) channel 19, Johnstown, Pennsylvania. I owned and operated the station from February 1983 through the Fall of 1989. WFAT was literally forced off the air by harsh treatment it received from the cable systems located in the Johnstown-Altoona area." Source: Comments of Leon A. Crosby, Former Licensee of WPTJ-TV, Johnstown, PA in MM Docket No. 90-4 at 1 (Sept. 25, 1991); CR VOL. I.P, EXH. 63, CR 10780.

398. The record also included the following information:

> " 'In 1984, in order to make channel 19 [WPJT] more competitive, I invested a great deal of money to increase its coverage by moving the station's transmitter site and increasing its output power from 5,000 watts to 1.7 million watts. When Channel 19 started broadcasting from its new transmitter site, we requested cable carriage on Harron Cable of Greensburg (now Marcus Cable), the largest cable system in Westmoreland County (40,000 subscribers). 'Harron Cable initially stalled on our request and eventually refused carriage of my station. We were then forced to file suit against Harron Cable

for cable carriage under the original must-carry laws. We won the initial decision. Harron Cable filed an appeal. We won the appeal. After 11 months and $40,000 in attorney fees later Channel 19 finally got on the Harron Cable system in July of 1985. On the very afternoon, the original must-carry laws were abolished in September of 1985 Channel 19 was taken off the Harron Cable system. Later I learned that Harron Cable had been negotiating with several advertising insertion companies to handle all of its local advertising and had entered into an agreement with Cable-Abnet in early 1985.'"

Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 2-3 (Sept. 25, 1991) (Exhibit C); CR VOL. I.K, EXH. 21, CR 08465-66.

399. The following information was in the record:

"In fact, the case of WPTJ provides a dramatic illustration of the harm suffered by a station when it loses cable carriage. Although the station had been on the air for over 30 years, it could not survive once major cable systems in its coverage area determined to drop or reposition its signal. Ironically, in an effort to improve its coverage the station invested half a million dollars in new technical facilities in the mid-'80s. All cable systems in the new coverage area had carried the station, except one, which after a year of litigation at the Commission, finally carried the station's signal. That system had 40,000 subscribers and was the largest in the county in which the station gained critical new coverage. Only two months after the system finally started to carry WPTJ (then WFAT), the court held the must carry rules invalid, and the system dropped the station. increased advertising sales in that county had accounted for 33% of the station's income in the fourth quarter of 1985, resulting in profitable operation for the first time in 10 years. However, once cable carriage was lost on the system, advertising contracts from that county were not renewed. In the ensuing five years, additional cable systems (listed in Exhibit D) dropped or repositioned WPTJ. In mid-1990, the station went dark, after being on the air since October 15, 1953!"

Source: Reply Comments of the Association of Independent Television Stations, Inc. in MM Docket No. 90-4 at 16-17 (Oct. 25, 1991); CR VOL. I.Q, EXH. 81, CR 11374-75.

WFFT

400. The following information was in the record: "WFFT-TV, channel 55, Fort Wayne, Indiana, has been dropped by one system and shifted on another. Neither gave notice of the change. Dimension Cable in Brunersburg, Ohio, shifted WFFT from channel 4 to channel 35, the only reason given for the shift was clustering. Jones Intercable in Constantine, Michigan, deleted WFFT from their system offering no explanation for the deletion." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 3 (Sept. 25, 1991) (Exhibit B); CR VOL. I.K, EXH. 21, CR 08453.

WFHL

401. The record indicated that: "A number of cable systems in Central Illinois have refused to carry WFHL-TV and some have even removed us from their systems, much to the frustration of our viewers. It seems that even overwhelming response of viewer dissatisfaction does not sway their decision. As a small independent broadcasting facility, we do not have clout to persuade these cable systems to include us in their line-up.'" Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 1 (Sept. 25, 1991) (Exhibit C); CR VOL. I.K, EXH. 21, CR 08464.

WFTX

402. The record also indicated that: "In October 1985, WFTX, Cape Coral, Florida, less than 10 miles distant from Ft. Myers, became the first independent to serve the Ft. Myers-Naples market; yet it is not carried by the 30,000-subscriber cable system serving Ft. Myers. The Naples cable system carries WFTX only on a pay tier, reducing the stations' access to the systems' 34,000 cable households by about 50 percent. By contrast both systems carry all the local network affiliates and numerous distant signals." Source: Comments of Association of Independent Television Stations, Inc. in MM Docket No. 85-349 at 65 (Jan. 29, 1986); CR VOL. I.BB, EXH. 162, CR 15893. *See also* Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 3 (Sept. 25, 1991) (Exhibit B); CR VOL. I.K, EXH. 21, CR 08453.

WGEM

403. The record included the following: "On January 15, 1987, Sammons Communications, absentee owners of the Jacksonville cable system in Morgan County, Illinois and several other cable systems, deleted WGEM-TV, Channel 10 from their cable system without any prior warning or without giving Quincy Broadcasting Company the opportunity to share viewer research with them. WGEM-TV was replaced by a Cable Value Network (CVN) home shopping channel. Approximately 8,200 households (roughly 24,600 people) in Jacksonville were, therefore, without the means to receive the signal of WGEM-TV, Channel 10. WGEM-TV, Channel 10 has served Western Illinois for over 30 years with news coverage and Aribtron Research documents the fact that we were among the top three viewed stations in the whole of Morgan County. Under the old FCC 'must carry' rules, WGEM-TX was a significantly viewed station in Morgan County, Illinois and entitled to 'must-carry'

status. This denial of carriage to WGEM-TV has eliminated the access of the Jacksonville community to our local news, sports, and community affairs programming, and also left a void in our service area that caused the cancellation of our Jacksonville advertisers because of our loss of access to 8,200 households." Source: Comments of Quincy Broadcast Company, License of WGEM-TV, Quincy, Illinois, in MM Docket No. 88-138 at 1 (July 1, 1988); CR VOL. I.Y, EXH. 130, CR 15041.

404. The record also indicated that: "WGEM-TV, Channel 10 was repositioned three times during approximately four months in 1987 on the Heritage cablevision system in Ft. Madison, Iowa. The Fort Madison cable system has approximately 4,600 subscribers. WGEM-TV was repositioned from Channel 10, to Channel 20 to Channel 18 and then to Channel 16. Since we were not advised by the cable system of these changes, we cannot provide detailed information as to when each of these repositioning occurred. We have received conflicting information from Heritage Cable TV and the local Ft. Madison newspaper." Source: Comments of Quincy Broadcasting Company, Licensee of WGEM-TV, Quincy, Illinois, in MM Docket No. 88-138 at 2 (July 1, 1988); CR VOL. I.Y, EXH. 130, CR 15042.

WGNT

405. It was reported in the record that: "WGNT, Portsmouth, Virginia, was shifted by Cox Cable from channel 7 to channel 27. Although the station did attempt to negotiate with the cable company, no negotiations were allowed. The only explanation the station offered was that they wanted to replace WGNT with a revenue producing channel at their old position." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 6 (Sept. 25, 1991) (Exhibit B); CR VOL. I.K, EXH. 21, CR 08456.

WGOT

406. The record indicated that: "WGOT is licensed to Merrimack, New Hampshire. The station began operation on August 14, 1987, but has not been carried on the cable system in its community of license. Most recently, the local cable system has offered to carry WGOT in return for a blanket waiver of syndex protection for all the cable operated systems. WGOT has refused the offer." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 1 (Sept. 25, 1991) (Exhibit B); CR VOL. I.K, EXH. 21, CR 08451.

WGSE

407. The record reported the following action relating to WGSE: "WGSE-TV, channel 43, Myrtle Beach, South Carolina, has been shifted by two cable companies. Cox Cable Inc. in Myrtle Beach shifted WGSE from channel 4 to 23. No notice was given of the shift, and no negotiations were allowed, although attempted by the station. the only explanation offered by Cox was that the shift was in their best interest. Jones Intercable in Surfside, South Carolina, also shifted WGSE. The station was shifted from channel 8 to 43. The station was not made aware of the shift until it was sent a brochure from the cable company indicating the shift. No negotiations were allowed, and the only explanation given was that they were going to move all the channels to their proper position. WGSE was obviously not moved to its proper position, as was the same for several stations." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 6 (Sept. 25, 1991) (Exhibit B); CR VOL. I.K, EXH. 21, CR 08456.

WHAI

408. The record indicated that: "WHAI-TV is a newly licensed station (effective date April 1989). It is the

only full-power commercial station licensed to Bridgeport, CT, the largest city in the state. The absence of must-carry and the fact that cable systems in the area can refuse or delay carriage has made it virtually impossible to acquire the requisite full financing for WHAI-TV. The station may not be positioned to enter the market, let alone compete in it." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 1 (Sept. 25, 1991) (Exhibit C); CR VOL. I.K, EXH. 21, CR 08464.

WHCT

409. The record included the following: "WHCT was acquired on January 23, 1985 by Astroline Communications Company ("Astroline") pursuant to the Commission's distress sale policy. This policy was designed specifically to assist minorities in gaining a foothold in broadcast station ownership. Nearly fifty percent (50%) of the Hartford/New Haven market subscribes to cable. In May 1985, Astroline had commitments for cable carriage in more than 600,000 homes in the Hartford market. By September 30, 1985, a little over a month after the *Quincy* case was decided, Astroline had been able to retain less than half of this cable carriage in its home market. This has resulted in an immediate loss of potential viewers and, thus, an immediate loss of advertising revenues. Astroline estimates that it will lose over $2 million in advertising revenues in 1986 if WHCT is not carried on all local cable systems." Source: Joint Comments of Howard University, The National Association of Black-Owned Broadcasters, The National Bar Association and the National Conference of Black Lawyers Communications Task Force, in MM Docket No. 85-349 at 8 (Jan. 29, 1986); CR VOL. I.AA, EXH. 161, CR 15806.

WHKE

410. The following information was in the record:

"WHKE is licensed to Kenosha, Wisconsin, which is located between Milwaukee and Chicago. It is considered part of the Milwaukee ADI. WHKE commenced broadcast operations on June 1, 1988, and is not carried on any cable systems. A. C. Nielsen estimates that of the approximate 773,000 television households in the Milwaukee ADI, 52% (398,000) subscribe to cable. Despite serving as the only television station licensed to Kenosha, with a population of approximately 124,000, the Kenosha cable system (Jones Spacelink) refuses to carry WHKE.

LeSEA began discussions with Jones seeking carriage of WHKE on the Kenosha system prior to commencing broadcast operations. Jones has steadfastly refused to carry WHKE. The Kenosha system has responded to LeSEA stating that it is not in the business of helping other competing businesses get started, that the system has to put on those program services which it considers are most profitable, and that it can make more money carrying a satellite service. The system carries VISN, a satellite delivered religious program service in which Jones has a financial interest, and which competes directly with WHKE's religious programming. The cable system also competes with WHKE in broadcasts of local high school sports events. The cable system also carries Mind Extension University, which Jones owns, and which competed with broadcasts of college classes from Gateway Technical College, the Wisconsin technical school system, which WHKE previously broadcast. The other cable systems in WHKE's service area have offered similar and other reasons for not carrying WHKE, including their unwillingness to carry the station when it is not carried

on the Kenosha system, that WHKE would compete with them, and that their system is full, despite having dropped and added services since WHKE signed on."

Source: Comments of LeSEA Broadcasting Corporation, in MM Docket No. 90-4 at 8-9 (Sept. 25, 1991); CR VOL. I.P, EXH. 65, CR 10836-37.

WHMB

411. The record included the following information about WHMB:

"Subsequent to *Century Communications,* Comcast decided to drop WHMB from its system. A brief summary of the events which transpired is illustrative of the attitude which many cable systems have taken in the post-must-carry era.

On approximately September 1, 1988, the general manager of WHMB to inform him that Comcast was considering dropping WHMB in favor of TNT (Turner Network Television). The Comcast manager stated that the decision was not final, but that it appeared at minimum WHMB would receive reduced signal carriage time if it was not dropped completely. The next day WHMB broadcast a 15 minute discussion of the situation during a regularly scheduled daily program. Within two hours of the broadcast Comcast deleted the WHMB signal from its system. Comcast's manager contacted WHMB stating that the station had misunderstood him, that the decision concerning WHMB was not final, that the station should not have viewers contact the cable system, and that Comcast would reinstate WHMB (at least temporarily) only if it stoped broadcasting comments against the cable system and agreed not to rebroadcast the discussion (the program in which

the discussion occurred was scheduled for a second broadcast that evening). WHMB agreed to await Comcast's final decision before broadcasting further appeals to its viewers.

After Comcast reached its final decision to drop WHMB from its system it failed to inform LeSEA, as it had promised. LeSea learned of the decision when one of its employees received in the mail a new channel line-up card from Comcast, effective October 1, 1988, which did not include WHMB. Later that day LeSEA confirmed with Comcast its decision to drop WHMB. The station again broadcast an appeal to its viewers to contact Comcast and voice their opinion. As a result, Comcast deleted WHMB from its system three days prior to the scheduled deletion date.

Comcast refused to carry WHMB for approximately one year, until WHMB was able to negotiate an agreement with the system to lease one of its access channels in return for a $13,300 monthly payment (approximately $160,000 per year). As a result of subsequent renegotiations WHMB now pays Comcast $120,000 per year for carriage on a leased channel.

Comcast is not the only cable system in the Indianapolis market for which WHMB was previously a must-carry signal and which deleted WHMB following the *Quincy* and *Century Communications* decisions. Most recently, in June of this year five TCI systems deleted WHMB in favor of TCI's own Encore movie service. WHMB has found the numerous cable systems which removed WHMB to be extremely uncooperative in discussions looking toward reinstatement of WHMB's carriage.

The deletion of WHMB from local cable systems has resulted in station customers removing their

advertising or paid programming, seeking to renegotiate contracts, or refusing to purchase additional time until the station is carried on cable. It has also forced the cancellation of locally produced programming specifically directed to communities in the station's service area. As a result of the dropped carriage it is no longer possible to obtain the advertising revenue from these communities which is necessary to support such programs.

WHMB devotes approximately twenty hours per week to locally produced programming, including a weekly thirty-minute public affairs program, a daily (Monday-Friday) thirty-minute talk show, and a weekly thirty-minute health program. WHMB also broadcasts locally produced high school basketball, football and soccer games, as well as local religious programming. The station provides informational programming during local emergencies, operates a live, twenty-four hour prayer line which receives, in average, more than 1,500 calls per month, including twenty to thirty potential suicides. In addition to its local programming, WHMB also broadcasts family entertainment and religious programming.

The $120,000 paid annually to Comcast for carriage on its Indianapolis system deprives WHMB of those funds and of its ability to provide more local programming directed to Indianapolis and surrounding communities. WHMB continues to face threats of removal from additional cable systems in the Indianapolis market, and has also suffered through numerous channel repositionings, including five different channels on the Comcast system in the last six years."

Source: Comments of LeSEA Broadcasting Corporation, in MM Docket No. 90-4 at 5-8 (Sept. 25, 1991); CR VOL. I.P, EXH. 65, CR 10833-36.

WHNS

412. The record indicated that: "WHNS-TV, channel 21, Asheville, North Carolina, has been shifted by two cable companies and denied carriage altogether on a third company. TCI Cablevision of Georgia in Toccoa has denied WHNS carriage several times; the only explanation given is that their capacity is too limited to add the station to thier lineup. Asheville Cablevision shifted WHNS from channel 12 to 31. The station has been at channel 12 for six years at the time of the shift and was given one month notice prior to the change. The explanation given was that they were attempting to put all of the stations on their corresponding channel number. TCI Cablevision of Greenwood, South Carolina, also shifted WHNS. In this case the station was shifted from channel 12 to channel 18 after at least six years of carriage. There was no notification of the shift given, and no explanation for the shift has been offered." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 6 (Sept. 25, 1991) (Exhibit B); CR VOL. I.K, EXH. 21, CR 08456.

WHSE & WHSW

413. The record included the following: "For example, as of March 1991, WHSE(TV), Newark, New Jersey was carried on only 13 of 44 cable systems in its service area. As a result, only 875,000 of the 2.4 million cable households in the station's viewing area, approximately 36%, had access to WHSE's programming. In the case of WHSW(TV), Baltimore, Maryland, the station was carried on only four of the 17 cable systems in the Baltimore ADI. As a result, only 131,300 of the 460,000 cable households in the station's ADI, approximately 29%, had access to WHSW's programming. These examples are the rule, rather than the exception, for HSN's stations, and we suspect, for independent stations generally." Source: Comments of Home Shopping Network, Inc. in MM Docket No. 90-4 at 7-8 (Sept. 25, 1991); CR VOL. I.P, EXH. 21, CR 10933-34.

WHSL

414. The following information was in the record:

"The recent experience of Robert Broadcasting, a minority owned company, in constructing WHSL-TV, Channel 46, the first new commercial television station in St. Louis in 20 years, illustrates how the financing of new local television stations has become tied to cable carriage since The Cable Act. Roberts Broadcasting applied to the FCC for a construction permit to build Channel 46 in 1981 and then engaged in a six year, expensive comparative hearing. In 1987, Roberts Broadcasting was awarded a construction permit. After receiving the CP, however, Roberts Broadcasting began what became the more difficult process of securing construction financing. In 1981, in securing a financial commitment, the company found that banks were interested in two primary considerations: the capability of station management and the station's proposed programming. By 1987, a significant new consideration had arisen. In addition to management capability and programming proposals, banks demanded to know the cable penetration in the market and whether the permittee had guarantees that the new station would be carried on local cable systems. In the Roberts Broadcasting case, even though its business plan demonstrated strong abilities in management and programming, cable carriage was so unpredictable that bank after bank refused to extend construction financing. What Roberts Broadcasting and other new entrants have found is that the rules of the game changed from the time when cable systems were required to carry local television stations and 1987,

when must carry was no longer required and cable had become the dominant video gateway to the home.

Roberts Broadcasting ultimately secured financing for Home Shopping Network, Inc. and signed on last September. Yet even though its station has the strongest signal in the market and airs *21* hours of nonentertainment, informational, issue oriented programming, childrens' programming and public service announcements *each week,* it has yet to break down the barriers created by cable operators in the market. Of the 1,056,400 TV households within a 35 mile radius of St. Louis, 359,196 are cable households. However, WHSL is only available to 93,690 or 26% of the cable households. This means that WHSL and its 21 hours a week of nonentertainment and issue oriented programming is *not* available to 265,506 or 74% of the cable households."

Source: Joint Reply Comments of Blackstar Communications, et al., in MM Docket No. 89-600 at 3-4 (Apr. 2, 1990); CR VOL. I.X, EXH. 120, CR 14404-05.

WINN

415. The following information was included in the record: "WINN-9 (PBS), Evansville, IN, David Dial, 'Owensboro and Albian threaten to drop. They need those channels for things such as the Home Shopping Network. The 11 other cable systems which already dropped us never gave any notice or explanation.' 11 systems dropped (8 within 50 mi/8 meet viewing std/no info on no. subs or other three systems) 2 systems threatened drops unless pay-for-carriage." Source: Comments of the National Association of Broadcasters, Appendix Volume, in MM Docket No. 88-138 at 1 (July 8, 1988) (WINN-9 (PBS)); CR VOL. I.Y; EXH. 128, CR 14999.

WIVB

416. The record indicated that WIVB-TV, in Buffalo, New York had been "deleted by Genessee Cable to make room for an additional pay channel." Source: Reply Comments of the National Association of Broadcasters, in MM Docket No. 88-138 at 4 (Aug. 8, 1988); CR VOL. I.Z, EXH. 143, CR 15365.

WJAL

417. The record indicated that: "WJAL-TV, channel 68, Hagerstown, Maryland, was not carried by the Warner Cable system in Chambersburg, Pennsylvania, for more than three years after the station signed on in May, 1987. The station was positioned on channel 35, outside basic service. The station reports: 'It is clear our station is suffering economic hardship from the previous lack of carriage and current channel position because, although our office is located in Chambersburg, our sales in the community are difficult. Many of our potential advertisers say they didn't know we were on the cable system at all.'" Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 52 (Sept. 25, 1991); CR VOL. I.K, EXH. 21, CR 08373.

WLIG

418. The record included the following information regarding WLIG:

> ¶ 10: "Operating with the maximum height and power permitted by the Commission, the station covers almost all of Long Island's 864,000 television households with at least a Grade B signal. WLIG is committing to providing top-quality family entertainment and community programming to the entire Long Island market. WLIG's program line-up provides wide variety of family-oriented movies and such popular classic syndicated programming at 'The Fugi-

tive,' 'Ben Casey', and 'Lost in Space.' WLIG's programming staff produces the only nightly commercial TV news broadcast about Long Island. Within the recent past, the thirty-minute news program has covered such important Long Island stories as the Shoreham nuclear power facility, toxic waste dumping and local government kickbacks. When Hurricane Gloria struck Long Island in October, WLIG provided vital television coverage of the disaster, including constant weather and relief updates. WLIG also produces and broadcasts a regular half-hour weekly magazine format program completely about Long Island. In addition, WLIG has just begun a new weekly public affairs program called 'Focus on Long Island.

¶ 11: Despite the need for a Long Island station and the tremendous effort that the station has made, WLIG predicts a loss of $1.6 million during its first year of operation. Losses are expected to continue as long as Long Island's cable systems continue to deny WLIG access to its potential audience. WLIG reaches 54% fewer television households on Long Island because of the refusal by cable operators to carry WLIG or their refusal to carry the station on the basic tier. This lack of cable carriage has frustrated WLIG's efforts to solicit advertising and has forced the station to charge proportionately lower advertising rates than it would be able to charge if it had access to those critical additional households. These reduced revenues will inevitably have an impact on the station's ability to provide local programming and otherwise serve the public interest.

¶ 15: In addition, WLIG has higher costs because it is committed to providing a daily local news program for Long Islanders. WLIG's news program is the *only* over-the-air commercial television news program covering Long Island. WLIG's evening news

program employs a staff of sixteen people. The station's news operation costs $215,000 more per year than the typical UHF independent spends on news programming.

¶ 23: In trying to establish itself in the difficult Long Island market, cable carriage is indispensable. At present, 467,000 of Long Island's 864,000 TV households subscribe to cable. Of these 467,000 households, only 159,000, or 23%, have access to WLIG. WLIG's inability to reach this huge number of households means both lower ad rates for the station and greater difficulty in attracting advertisers. Without carriage, WLIG will continue to be caught in a vicious cycle of not having the audience and advertising to build itself into an established station that is able to compete in the Long Island video market. WLIG must be carried on Long Island cable system's if it is ever to develop its audience potential.

¶ 24: Long Island's 864,000 households are divided almost evenly between Nassau and Suffolk Counties. Suffolk County, lying further from New York City, has the greater cable penetration. Approximately 274,000 Suffolk County households subscribe to cable television. Of these 274,000 households, 159,000 have access to WLIG. The other 111,000 households subscribe to cable systems that either do not carry WLIG or carry WLIG on a higher-priced tier that the household does not purchase. In Nassau County, none of the cable systems carry WLIG. Thus, WLIG is effectively denied access to any of Nassau County's 192,000 cable subscribers. In sum, only approximately 548,000 of Long Island's 864,000 television households have access to WLIG. Cable operators have prevented the other 308,000 households from viewing WLIG over their cable systems.

¶ 25: Without cable carriage, WLIG is effectively denied access to those 308,000 households.

Source: Comments of WLIG in MM Docket No. 85-349 ¶¶ 10, 11, 15, 23-25 at 7-16 (Jan. 29, 1986); CR VOL. I.AA, EXH. 155, CR 15681-90.

419. The record also indicated that: "WLIG, Channel 55 Riverhead, New York, is the only commercial television station licensed to serve Long Island. The cable system serving a major portion of WLIG's audience refuses to carry the station. The cable system has begun a 24 hour a day local news service and is aggressively selling local advertising spots." Source: Appendices to Tesitmony of James B. Hedlund, President, Association of Independent Television Stations, Inc. Before the Subcommittee on Telecommunications & Finance, Committee on Energy & Commerce, U.S. House of Representatives at 19 n.24 (May 16, 1990) (Statement of James H. Quello); CR VOL. I.M, EXH. 24, CR 09172.

420. The following information was also in the record: "WLIG-TV, channel 55, Riverhead, New York, continues to be denied carriage on the main Cablevision system on Long Island. The station reports: 'We are currently being deprived of reaching over 100,000 cabled homes in our home county, Suffolk, as a result of cablevision's non-carriage of WLIG-TV.' " Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 51 (Sept. 25, 1991); CR VOL. I.K, EXH. 21, CR 08372.

WMFP

421. The record indicated that: "WMFP Channel 62 is licensed to Lawrence, Massachusetts and is home to the Boston ADI. The station went on the air in mid-October, 1987. In advance of sign-on we contacted all the cable outlets within 50 miles of our city of license. In that radius there were 53 cable facilities in Massachusetts and 14 in New Hampshire. We ended up being carried by 3 cable systems in Massachusetts, none in New Hampshire. The responses we got from the cable operators were varies. Some gave us no response, some merely informed us that we would not be carried. Some said there were no channels available, and some over attorneys' signatures, got very legalistic, citing precedent and court cases to conclude that must carry had no legal force with them. (This was while the second set of must carry rules was still in effect.) As a new, local station the cable situation has certainly been adverse for us. It has compromised our ability to develop the new station, and it has caused us to scale back our plans for programming, especially in the area of local programs. When a station has less access to and therefore support from local communities, there are fewer resources available for local program development." Source: Comments of the National Association of Broadcasters, Appendix Volume, in MM Docket No. 88-138 at 1 (July 8, 1988) (Letter from Abi Nelson); CR VOL. I.Y, EXH. 128, CR 14784.

422. The record also indicated: "WMFP signed on the air in October 1987, while the FCC's new must-carry rules were still in effect. Prior to their on-air date, the station sent letters to all 53 cable systems operating within 50 miles of Lawrence. However, as of mid-April 1988, WMFP had achieved carriage on only three cable systems in its market." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 19 (Sept. 25, 1991) ("Free Television Under Siege," INTV (May 1988)); CR VOL. I.K, EXH. 21, CR 08573.

WNEG

423. The following information was in the record: "WNEG (Toccoa, GA) cited a situation whereby a[t] least one cable system chose not to carry it because of competition for advertising. A local cable system trying to sell advertising used noncarriage as a means of reducing advertising competition. WNEG was replaced with TNT on this system." Source: Comments of the National Association of Broadcasters in MM Docket No. 89-600

at 3 (March 1, 1990) (Exhibit 5); CR VOL. I.T, EXH. 104, CR 12313.

WNJU

424. The record included the following information about WNJU in Teterboro, New Jersey: "WNJU, a station with much programming responsive to minority population needs, has been dropped by seven cable systems within 50 miles (would meet viewing standard on at least one system). According to station personnel, one cable system demanded cash payments of $60,000 per year to continue carriage of WNJU." Source: Consolidated Opposition of the National Association of Broadcasters to Petitions for Reconsideration in MM Docket No. 85-349 at 8-9 (Feb. 18, 1987); CR VOL. I.DD, EXH. 192, CR 17077-78.

WOAC

425. The record indicated that: "WOAC-TV, channel 67, Canton Ohio, has been shifted on one system and deleted on another. TCI Media, Inc. in Ravenna, Ohio, deleted WOAC from their system after five years of carriage. WOAC is within 35 miles of TCI. TCI allowed no negotiation, and the only explanation offered was that of the system's rebuilding." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 9 (Sept. 25, 1991) (Exhibit B); CR VOL. I.K, EXH. 21, CR 08459.

426. The record also indicated: "WOAC-TV signed on March 1, 1982. Our market was and is the southern portion of the Cleveland ADI. Our station was designed to cover the Akron/Canton market, to a *large degree by cable*, based on the must carry rules in effect at the time. In 1988 WOAC was dropped from the largest cable system in the market, 'Warner Cable of Akron'. This cut our potential cable audience from approximately 192,000 households to 114,000." Source: Letter from Mike Larson (WOAC-TV, Canton, Ohio) to Alfred C. Sikes (Jan.

15, 1991), included in record in MM Docket No. 90-4 (Jan. 30, 1991); CR VOL. I.O, EXH. 40, CR 10046.

WOFL

427. The record indicated that: "This past summer, the Orlando-Daytona Beach market's oldest and highest-rated Independent station discovered that the TCI-owned cable systems in Daytona Beach (30,000 subscribers), Titusville (12,000 subscribers) and Barefoot Bay (3,000 subscribers) had removed WOFL from its long-held position in the first twelve channels. In every case, TCI replaced WOFL with a cable service in which it held an equity interest. In addition, cable systems in Cocoa-Beach (11,000 subscribers) and Lake County (25,000 subscribers) also pushed WOFL from the lower dial to a channel position above #14. WOFL lost access to virtually all the hotel/resort rooms in this tourist-dependent region. In areas like this, many local businesses actively seek tourists' business by advertising on television stations which are viewable in the hotels, and has suffered significant problems as a result. Most importantly, preliminary Nielsen data ordered by WOFL shows significant ratings declines among cable subscribers in the systems identified above, on the order or 16% as compared to other area cable homes where WOFL was not moved, with an estimated loss of $300,000 in revenues on a yearly basis." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 21 (Sept. 25, 1991) ("Free Television Under Siege," INTV (May 1988)); CR VOL. I.K, EXH. 21, CR 08575.

428. The record also indicated: "These seven systems serve more 110,000 homes of the total potential cable subscriber base serviceable by WOFL, including more than 18% of DMA/ADI cable homes and 11% of total DMA/ADI TV homes. Their actions have ha a major impact on our ratings and revenues. A recent Nielsen study I completed show ratings dropped approximately

15% in the areas where we were repositioned off our original channel, a decrease I estimate is costing WOFL $300,000 per year and climbing in lost local and national advertising revenues." Source: Comments of the National Association of Broadcasters, Appendix Volume, in MM Docket No. 88-138 (July 8, 1988) (Letter from Tom Meek); CR VOL. I.Y, EXH. 128, CR 15031.

WOIO

429. It was reported that: "WOIO, channel 19, Cleveland, Ohio, has been shifted by two separate cable companies. Clear Picture-Wooster moved the station from channel 10 to 20, channel 10 was replaced with the Cable News Network. There were no negotiations made with the station, and the cable company offered no explanation for the shift. The second company to shift WOIO was Massillon Cable in Brewster, Ohio. Massillon informed the station that they were to be shifted from channel 18 to channel 10. Instead the station was shifted to channel 29, with no explanation for the change in shift. No negotiations were allowed." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 4 (Sept. 25, 1991) (Exhibit B); CR VOL. I.K, EXH. 21, CR 08454.

WPBT2

430. The following information was in the record: "In reference to our conversation this week concerning cable alignment changes in our market, the cable company Americable Associates on April 1986 moved WPBT2 from cable channel 8 to cable channel 16. This move was made without notification to WPBT2 and occurred during our Membership Drive which is vital to a public television station. We were notified of this change by viewers who could not locate our programming. Americable Associates was sold and presently is Adelphia Cable Communications. WPBT2 remains on cable channel 16.

Subscribers must lease a converter box to gain access to cable channel 16. A converter is not necessary for channels 2-13 on this cable system. There is not a public television station on the lower 2-13 channels on Adelphia Cable." Source: Comments of the National Association of Broadcasters, Appendix Volume, in MM Docket No. 88-138 at 1 (July 8, 1988) (Letter from Carol Richards); CR VOL. I.Y, EXH. 128, CR 14796.

WPGH

431. The record included the following information about WPGH: "WPGH, channel 53, Pittsburgh, Pennsylvania, has been shifted by our separate cable companies. Times Mirror in Amwell, Pennsylvania, which has carried WPGH since 1979, recently, without notice, shifted WPGH from channel 10 to channel 35. The station was replaced on channel 10 by Nickelodeon. Times Mirror offered no explanation for the shift. Armstrong Utilities in Adams, Pennsylvania, shifted WPGH from channel 3 to 16. This situation was identical to the one above, only here the station was replaced by 'The A Channel.' " Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 5 (Sept. 25, 1991) (Exhibit B); CR VOL. I.K, EXH. 21, CR 08455.

432. The record also indicated: "National Cable TV in Connelsville, Pennsylvania, also shifted WPGH. Since before 1979 the station was carried on channel 3. Then without notice or explanation, WPGH was shifted to channel 18. TCI cable also carried WPGH since before 1979. In the beginning of 1987, without any notice, the station was shifted from channel 10 to channel 20. Again, no explanation was given for the shift." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 5 (Sept. 25, 1991) (Exhibit B); CR VOL. I.K, EXH. 21, CR 08455.

IN THE UNITED DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

DEFENDANTS' JOINT STATEMENT OF EVIDENCE BEFORE CONGRESS

PART 2 OF 2

* * * *

Dated: May 26, 1995

WPGX

433. The following information about Station WPGX in Panama City, Florida was in the record:

> "In April of 1988, the Panama City market began to receive service from its first Independent station—WPGX. In fact, it is only the third station in the entire market (the affiliate of one network and the public station are imported from adjoining markets). WPGX plans—in addition to a vast array of top syndicated shows and movies—a lot of local programming.
>
> In spite of this, the major cable system in the market—Comcast, serving Panama City—has told WPGX that it will not carry the station. According to the cable system, there is no room on their system for the new local business. There is, however, room for *16* cable services on which Comcast sells local advertising, including a home-shopping service (partially owned by the cable company)—plus a Sunshine Sports Network also partially owned by the cable company—plus *two* rock video channels.
>
> Lest the significance of Comcast's turndown be misunderstood, this is not a minor inconvenience for WPGX. Panama City is the 171st television market in the country; being denied access to all cable subscribers in the major population center of the market will seriously affect the viability of WPGX."

Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 21 (Sept. 25, 1991) ("Free Television Under Siege," INTV (May 1988)); CR VOL. I.K, EXH. 21, CR 08575.

WPLG

434. The record indicated that WPLG in Miami, Florida was "replaced on a Comcast system by QVC

Home Shopping channel in which Comcast has a financial interest." Source: Reply Comments of the National Association of Broadcasters, Appendices, in MM Docket No. 89-600 at 3 (April 2, 1990) (Reply Comments of the NAB); CR VOL. I.M, EXH. 119, CR 14352.

WPMI

435. The record indicated that "WPMI, channel 15, Mobile, Alabama, was shifted by Warner Cable, Ft. Walton Beach, from channel 11 to the higher tiered channel 15. The cable company decided that the position would be better filled by TNT rather than WPMI, which had been in that position since 1984. Other than that, no further explanation for the change was given." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 7 (Sept. 25, 1991) (Exhibit B); CR VOL. I.K, EXH. 21, CR 08457.

WPMT

436. The following information was in the record: "WPMT-TV, channel 43, York, Pennsylvania, has been shifted by two cable companies. TV Cable of Carlisle, Pennsylvania shifted the station from channel 2 to 34. No notice of the shift was given. The station was replaced on channel 2 by the Nashville Network. The cable company offered no explanation for the shift. TV Cable of Waynesboro, Pennsylvania, also shifted WPMT. The station was shifted from channel 2 to channel 28 without any notice prior to the switch. Again, the cable company offered no explanation for the shift, and no negotiations with the cable company were allowed." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 5-6 (Sept. 25, 1991) (Exhibit B); CR VOL. I.K, EXH. 21, CR 08455-56.

WPTY

437. The record included the following: "WPTY, channel 24, Memphis, Tennessee, was shifted by Memphis Cablevision from channel 12 to channel 24. The cable company would not negotiate and offered no explanation for the change, only that the station would be replaced on channel 12 by the Discovery channel." Source: Comments of the Motion Picture Association of America, Inc. in MM Docket No. 85-349 ¶ 6,8 (Jan. 9, 1986) (Affidavit of Richard Ramiraz); CR VOL. I.AA, EXH. 151, CR 15599-600.

WSCT

438. The record indicated that: "With one exception, cable systems contacted by WSCT since the *Quincy* decision have not returned repetitive phone messages. It seems they have no interest in carrying WSCT, even thought they have no idea of what it will offer or whether it will appeal to their viewers. Because more than half of the households in the Orlando-Daytona Beach-Melbourne ADI subscribe to cable, WSCT's failure to obtain cable carriage will automatically reduce its reach by 50% and severely hinder its capacity to earn revenues sufficient to stay on the air." Source: CRT Reform and Compulsory Licenses: Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, House Committee on the Judiciary, 99th Cong., 1st Sess. at 418 (June 19, 1985) (Affidavit of William R. Varecha); CR VOL. I.B, EXH. 6, CR 01096.

WSJT

439. The record indicated that: "WSJT first came on the air in July 1991, as WRBV (licensed to Renaissance Broadcasting Corp.). At that time, most cable systems within the station's viewing area refused requests to carry under the 'must carry rules.' The station's financial resources were depleted by the costs of construction delays and normal start-up expenses; it had no resources to

initiate and follow through on litigation to enforce its cable carriage rights. The station entered receivership (and eventually bankruptcy) on December 4, 1981. The bankruptcy trustee, seeking to preserve the station's operation for the benefit of New Jersey and the City of Vineland, expended large sums of money to litigate with the cable systems. Such large systems as NYT Cable (100,000+ subscribers), Atlantic Coast TV Cable (15,000+ subscribers) and Crosswicks Industries (12,000 subscribers) were required to add then-WRBV's signal, and remaining cable systems not specifically mentioned in that proceeding quickly followed with carriage. The increased cable penetration gained the station the necessary audience to permit it to run at an operating profit during the bankruptcy period. . . . If WSJT loses its current status of full carriage within its specified zone, as defined by the 'must carry' rules, I estimate an immediate loss of 50 per cent of WSJT's advertising revenue. Such a loss would be a fatal blow to New Jersey's largest broadcast television station, and the only one serving the entire southern half of the state." Source: Comments of the Motion Picture Association of America, Inc. in MM Docket No. 85-349, ¶ 6,8 at 2-4 (Jan. 9, 1986) (Affidavit of Brian H. Eckert); CR VOL. I.AA, EXH. 151, CR 15603-05.

WSYT

440. The record indicated: "In Syracuse, New York, WSYT-TV, channel 68, has been shifted by four cable companies. Fulton New Channels in Fulton, New York, shifted the station from channel 8 to 33 to 28 all within a year of the beginning of carriage. The explanation given was that the cable company was increasing the basic cable line-up from 11 to 27 channels, thus the station would still be included in basic cable service." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 4 (Sept. 25, 1991) (Exhibit B); CR VOL. I.K, EXH. 21, CR 08454.

WTGI

441. The record also indicated that: "WTGI, channel 61, Philadelphia, Pennsylvania, has been deleted from four separate cable systems. TKR of Hamilton, New Jersey, began carriage of WTGI in 1987; in 1989 the station was deleted. The only explanation offered for the deletion was the station signal was too distant and thus the station would be required to pay copyright fees. Comcast Cable in Montgomery County, Pennsylvania, also deleted WTGI. Carriage of the station began in 1987. In January 1990 the station was deleted; no advance notice was given, no negotiations allowed, and no explanation given for the deletion." Source: Comments of the Association of Independent Teelvision Stations, Inc. in M.M. Docket No. 90-4 at 5 (Sept. 25, 1991) (Exhibit B); CR VOL. I.K, EXH. 21, CR 08455.

442. The record indicated that: "Storer Cable in Dover, Delaware, also deleted WTGI. The station had been carried by Storer for less than two years when it was deleted by the cable company. The reason cited for the deletion was lack of subscriber interest in minority programming. Storer Cable in Woodbury, New jersey, also deleted WTGI. The station was not even on for a full year when deleted. In this case there was no notice given, no negotiations allowed, and no explanation given for the deletion." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 5 (Sept. 25, 1991) (Exhibit B); CR VOL. I.K, EXH. 21, CR 08455.

WTGS

443. The record included the following: "WTGS was for several months refused carriage at any price by Plantation Cablevision in Hilton Head, SC, 16 miles away. Since Hilton Head prohibits outdoor antennas, its 15,000 cable households could not view WTGS, although they could view the network stations carried on cable. The

reason for non-carriage? Stated the cable operator: 'Of course, as an advertising medium, we are competitors with WTGS. And, as a business, it doesn't make sense to subsidize a competitor if you don't have to.' On December 27, 1985, WTGS was added to the Hilton Head system, as a direct consequence of congressional testimony by WTGS' general manager. As the cable operator stated, 'the developments in Washington were important in our decision to introduce WTGS on the cable system.'" Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 5 (Sept. 25, 1991) ("Free Television Under Siege," INTV, (May 1988)); CR VOL. I.K, EXH. 21, CR 08578.

WTJC

444. The record indicated that: "WTJC-TV, Springfield, Ohio, serves its city of license in metropolitan Dayton, Ohio. Subsequent to cable deregulation, Viacom Cable of Dayton arbitrarily deleted WTJC-TV from all cable homes in the city limits of Dayton which are all within the city grade signal of the station. Other adjacent cable systems, within the station's coverage area, have also deleted WTJC-TV from smaller community cable wired homes. Since the city of Springfield, Ohio, does not enjoy sufficient retail advertising volume to sustain WTJC-TV, cable carriage throughout the station's coverage area in the Dayton A.D.I. is vital. This action deleting WTJC-TV, from Viacom Cable in the larger city Dayton, seriously damaged the station financially by denying access to cable wired households within the station's coverage area." Source: Comments by Marvin Sparks, President, Video Mall Communications Inc. (Licensee of WTJC-TV and WTLJ-TV, Springfield, Ohio) in MM Docket No. 90-4 at 2 (Aug. 30, 1991); CR VOL. I.P, EXH. 54, CR 10689.

WTLJ

445. The record included the following information:

"WTLJ TV has been a victim of the actions of local cable operators since 'must carry' rules were repealed in 1987. Since that time, WTLJ TV has been dropped from cable services throughout it's coverage area including the cable system in Muskegon, Michigan, WTLJ's city of license. This action has had the following effects on WTLJ:

* WTLJ no longer has access to approximately 60% of the homes within it's city of license.

* Programming addressing the needs and interests of local viewers is no longer reaching homes that have cable. Only access to all local viewing households can effectively motivate a local station to pursue higher levels of public service and quality local programming.

* The tremendous loss of audience demanded 1) deep budget cuts, 2) a change in program format, and 3) the sale of the station.

* Brokers representing the former owner of WTLJ TV were unable to secure written offers on WTLJ TV during the 18 month period ending November 19, 1990 due to lack of cable carriage and/or absence of needed must carry legislation.

* On February 1, 1991, Video Mall Communications, Inc. (a new venture led by former management), with prior F.C.C. approval, began ownership of the station in an effort to prevent bankruptcy.

* Current ownership and operation of WTLJ is threatened with tremendous financial hardship once again (due to loss of network revenue) if additional cable coverage cannot be restored.

* Local cable systems controlling nearly two-thirds of the cable households within WTLJ's coverage area have either never carried WTLJ or have stated that they will not add WTLJ to their system because they wish to carry services available on satellite."

Source: Comments of Richard L. Woodby, General Manager, WTLJ TV, Muskegon, MI, in MM Docket No. 90-4 at 1-3 (Sept. 13, 1991); CR VOL. I.P, EXH. 57, CR 10708-10.

446. The record also indicated:

"WTLJ-TV, Muskegon, Michigan, serves its city of license and surrounding metropolitan areas. In WTLJ-TV's city of license, Muskegon, the TCI owned cable operator arbitrarily deleted the television station from all cable wired households.

Many other adjacent city cable operators refused to carry WTLJ-TV, from sign-on November, 1986, or later deleted WTLJ-TV, which denied the station access to other households.

This lack of cable carriage further hampered any effort to modify the program formats of the stations under previous ownership due to lack of cable wired households. WTLJ-TV and WTJC-TV failed financially with previous formats and ownership due, in part, to either the absence of cable carriage, or later deletion of cable carriage.

Brokers representing the former owner of WTJC-TV and WTLJ-TV, were unable to secure any written offer for purchase of the properties during an approximate 18 month period ending November 19, 1990, due to the lack of cable carriage for the stations and/or the absence of needed 'must carry' regulation."

Source: Comments by Marvin Sparks, President, Video Mall Communications Inc. (Licensee of WTJC-TV and

WTLJ-TV, Springfield, Ohio) in MM Docket No. 90-4 at 2-3 (Aug. 30, 1991); CR VOL. I.P, EXH. 54, CR 10689-90.

WTOG

447. The record indicated that: "WTOG, channel 44, St. Petersburg, Florida, has been shifted by two cable companies. Storer Cable in Sarasota, Florida shifted WTOG from channel 9 to 25. This change was made with no notification, no negotiations, and there was no explanation offered to the station. Centel Cable in Lakeland, Florida shifted WTOG from channel 7 to 44. Again there was no negotiations or notice given and the only explanation was that they wanted to put the station on its corresponding channel number." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 10 (Sept. 25, 1991) (Exhibit B); CR VOL. I.K, EXH. 21, CR 08467.

448. The record also indicated:

"In 1988, Storer Cable decided to reposition WTOG, Channel 44, St. Petersburg, from Channel 9 to Channel 25 on the cable system. Storer initiated the repositioning so they could carry distant signal WGN, Channel 9, Chicago, on channel. With the repositioning of WTOG to Channel 25, WTOG lost audience share within the Sarasota ADI. As a result of WTOG's loss of audience share, Arbitron abolished the Sarasota ADI and placed WWSB, the only Sarasota television station, within the larger Tampa-St. Petersburg ADI.

Due to the loss of the Sarasota ADI—WWSB no longer receives the critical ratings and product usage information regarding the Sarasota market, but must rely on the diluted rating information of the much larger Tampa/St. Petersburg market. The loss of such market specific information has seriously hampered WWSB marketing efforts and adversely effected

its advertising revenues. Therefore, as a result of Storer Cable's decision to reposition one station in favor of a distant signal, WWSB, the only local Sarasota television station, was denied its local market designation and forced to compete in the larger Tampa-St. Petersburg market."

Source: Statement of Douglas C. Barker, President, Southern Broadcast Corp. of Sarasota, Before the FCC, Orlando, FL, included in record in MM Docket No. 89-600 at 4-5 (March 2, 1990); CR VOL. I.R, EXH. 83, CR 11478-79.

WTRT

449. The record includued the following information: "WTRT, channel 26, Florence, Alabama, is not carried on the three largest cable systems in its ADI, serving Huntsville and Decatur, Alabama. Station management notes that: 'The nature of the diary distribution makes it about impossible to receive any numbers which can be used for proof of audience. There are so few diaries in our end of the ADI that we just do not show up in the total market. Getting on those three cable systems would probably cure that situation. . . . An ADI Must-carry Rule on any channel may be our only hope for survival. My signal is there, the cable operators are not inclined to put us on even though all our program licenses are for Huntsville, Decatur, Florence, Alabama. We feel we are in a dead locked situation and are struggling.' WTRT also is carried on an upper tier channel (14) in its city of license. The Cable system sells local advertising on five of the channels 2-13." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 49 (Sept. 25, 1991); CR VOL. I.K, EXH. 21, CR 08370.

WTTO

450. The record indicated that: "WTTO-TV, channel 21, Birmingham, Alabama, has been shifted by five separate cable companies; only one of the cable companies offered any explanation for the shift. Cable South in Boaz, Alabama, shifted the station from channel 8 to 26. Cable South in Arab, Alabama, shifted the station from channel 9 to 26. Bettervision Cable in Dadeville, Alabama, shifted the station from channel 9 to 3. Cable South in Buhl, Alabama, shifted the station from channel 8 to 34. St. Clair Cablevision shifted the station from channel 3 to 21. All of the cable companies made the shift without giving the station any notice, and none allowed the station to negotiate the shift. St. Clair Cablevision was the only one of the five to offer any explanation at all for the move, combining the system headends." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 7 (Sept. 25, 1991) (Exhibit B); CR VOL. I.K, EXH. 21, CR 08457.

WTVZ

451. The record included: "WTVZ-TV, channel 33, Norfolk, Virginia, was also shifted by Cox Cable. WTVZ was shifted from channel 8 to 33 with three weeks notice before the change after almost ten years of carriage at channel 8. Cox did not allow negotiations, although the station did attempt to reach an agreement. Cox's only explanation for the change was that they wanted to put all of the stations 'on channel' and it met their (Cox's) needs." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 7 (Sept. 25, 1991) (Exhibit B); CR VOL. I.K, EXH. 21, CR 08457.

WTZA

452. The record included the following Affidavit statements of Edward Swyer, Managing Partner of WTZA:

3. Cable systems reach between 50-70 percent of all viewers in the Kingston market and cable carriage

is, therefore crucial. Indeed, had the must-carry rules not existed in 1984, WTZA might not have invested heavily in equipment and personnel totalling some $5 million in order to provide a state-of-the-art and professional broadcast service to viewers in the extended Kingston area.

4. Given the high cable penetration in the Kingston area and the D.C. Circuit Court's decision to strike down the must-carry rules some four months before WTZA went on the air, WTZA has had serious difficulty gaining access to the audience it is licensed to serve. It has experienced this difficulty despite unique local programming directed to Kingston and the extended Hudson River Valley area, including two (2) half hour live weekday newscasts plus hourly news updates and regular public affiairs programming such as 'Hudson Valley Weekly', 'On the River', and 'Hudson Valley Live', plus hour-long locally produced specials on such issues as drug abuse and Hudson Valley children and their art.

5. Although WTZA-TV broadcasts unique local programming not otherwise available on area cable systems, we estimate that it is carried in only 56,000 of some 210,000 homes in which it would qualify for carriage under the new must-carry rules. Indeed, even *before* WTZA went on the air, a local cable system petitioned for waiver of the must-carry rules so that it would not have to carry WTZA-TV, totally without regard to WTZA-TV's program offerings, community orientation or viewer desires.

8. Failure to implement the new must-carry rules as provided by the FCC *Report and Order* would greatly impact on WTZA-TV's future viability in the crowded and highly competitive Albany and New York ADI's. Although WTZA is grateful for cable cooperation to date, implementation of the new rules

is critical to the creation of a predictable regulatory environment in which WTZA-TV may obtain access to the audience it is licensed to serve. The fact remains that only 27% of the cable systems on which WTZA-TV is a qualified signal under the interim must-carry rules are carrying WTZA-TV today. Accordingly, WTZA estimates that in the absence of the proposed must-carry rules, it will be denied access to more than 150,000 cable subscribers, or nearly one-half of its entire viewing population, which will surely result in decreased advertising revenue and a real threat not only to WTZA-TV's local and regional programming but its ultimate survival."

Source: National Association of Broadcasters and INTV's Joint Opposition to Joint Motion for Stay in MM Docket No. 85-349 at 1-3 (Dec. 17, 1986) (Affidavit of Edward Swyer); CR VOL. I.DD, EXH. 182, CR 16721-23.

WUAB

453. The record indicated: "WUAB was Cleveland's first independent station, and is now 20 years old. In addition to a heavy schedule of movies, top-rated syndicated shows and sports, the station has inaugurated a local news show. Nonetheless, Cablevision Systems, owner of six suburban cable systems suddenly moved WUAB from its long-established channel position in the lowest tier up to various high channel numbers including 22 and 28 (not their off-air channel). The cable operator, in turn, used the channel vacated by WUAB for ESPN, and other services on which he sold local advertising." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 29 (Sept. 25, 1991) ("Free Television Under Siege," INTV, (May 1988)); CR VOL. I.K, EXH. 21, CR 08583.

WUTV

454. The record also indicated that: "Independent WUTV has served the Buffalo market for 18 years. Since its inception the station had been carried on channel #7 on the Buffalo cable system—the principal cable system in the entire ADI. Then, abruptly, TCI moved WUTV to cable #22 (not the station's off-air channel #29!) and replaced the local station with American Movie Classics —a TCI-owned service. In its new position, WUTV can only be seen by consumers with cable-ready TV sets or those willing to rent a converter from TCI. TCI also moved the local public station out of the first twelve channels. A jointly-orchestrated public campaign was mounted to have both local stations returned to their original positions. Finally, TCI consented to the return of the public station to its original position, but continued to stonewall on WUTV—the only local station not to be carried on the lowest level of the basic tier." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 30 (Sept. 25, 1991) ("Free Television Under Siege," INTV, (May 1988)); CR VOL. I.K, EXH. 21, CR 08584.

WUTV

455. The following information about Station WUTV was in the record: "In Buffalo, New York, station WUTV-TV, channel 29, has been shifted twice by TCI of Buffalo. WUTV has been on cable since 1976. In 1986 they were moved from channel 7 to channel 22, then in 1987 to channel 29. They received no notification of the shift to channel 22, and were notified only two months prior to the shift to 29. The only explanation that was given by the cable company was that the shift better served the public." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 4 (Sept. 25, 1991) (Exhibit B); CR VOL. I.K, EXH. 21, CR 08454.

WVAH

456. The record included the following information about Station WVAH:

> "Because of the hilly terrain, it is virtually impossible for West Virginia residents to receive broadcasts over-the-air. Cable television not only provides television to remote locations otherwise lacking television service but also corrects the inferior reception suffered by UHF stations, such as WVAH-TV, and establishes a technical parity between UHF and VHF transmissions. The most recent figures available indicate 62% cable penetration state-wide, while certain parts of the Channel 23 service area have cable penetration exceeding 90%. . . . From our start-up we have achieved carriage on cable systems throughout our service area. This achievement has, however, entailed repeated requests for relief from the FCC. Indeed, over the last three years, WVAH-TV has opposed numerous special relief petitions and expended thousands of dollars to obtain cable carriage. Given the mountainous terrain and general difficulty of receiving broadcast signals over the air, a prerequisite to broadcast existence in West Virginia is access to cable ssytems. *Had the must-carry rules not existed in early 1980, I doubt sincerely that we would have attempted to put WVAH-TV on the air.* . . . Even before the *Quincy* decision was released, cable systems serving the Charleston area began to carry WVAH-TV on an upper tier for which a converter is required rather than putting us in their lower-priced basic service. . . . In so positioning our station, the cable operator [Beckley Telecable System] made it clear to us, months before the *Quincy* decision, that it would not carry WVAH-TV on its basic tier because viewers would then have no incentive to purchase its 'pay tier' satellite serv-

ices (*e.g.*, ESPN and HBO) which offered similar programs but at an extra cost."

Source: Comments of the Motion Picture Association of America, Inc. in MM Docket No. 85-349 at ¶ 2, 3, 7, 11 (Jan. 9, 1986) (Affidavit of Gary Dreispul) (emphasis added); CR VOL. I.AA, EXH. 151, CR 15606-09.

WXIX

457. The record indicated that: "United Video Cablevision in Bainbridge, Kentucky, also deleted WXIX. In this case there was no notice given, no negotiations allowed, and no explanation for the stations removal was given. Cencom of Kentucky deleted WXIX in the same way—no notice, no negotiations, no explanation. Cencom Cable-Eminence in Eminence, Kentucky, did away with WXIX in September of 1989 after a long period of carriage without any warning at all. Again they allowed no negotiations and offered no explanation for the sudden deletion. Last, United Video Cablevision in Lakeville, Kentucky, also deleted WXIX. As most of the other cable companies did, United did not notify the station of the change, allow negotiations or offer an explanation." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 10-11 (Sept. 25, 1991) (Exhibit B); CR VOL. I.K, EXH. 21, CR 08460-61.

WXMI

458. The record included the following: "WXMI, channel 17, Grand Rapids, Michigan, has been shifted by six cable companies, none of which have offered any explanation for the shift. The moves were done without notification to the station and in no case were there any negotiations as pertained to the move. Cablevision of Michigan-Kalamazoo shifted the station from channel 10 to 17, Estmarc Cable-Muskegon shifted the station from 4 to 22, C-Tec Cablesystems-Montague shifted the

station from 2 to 23, Westmarc Cable-South Haven shifted the station from 16 to 22, Northern Cable-Grant shifted the station from 4 to 31, and C-Tec Cablesystems-Allendale shifted the station from 15 to 30." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 3 (Sept. 25, 1991) (Exhibit B); CR VOL. I.K, EXH. 21, CR 08453.

459. The record also indicated that: "In March 1987, Grand Rapids' only Independent station—WXMI—learned that it had 'temporarily' been removed from the Lakeland Cable system, serving South Haven, Michigan. There had been no notification to the station or, presumably, the subscribers. The cable system indicated that WXMI, which had been carried on cable channel #10, would eventually be returned to the cable line-up, but this time on channel #16—a position which would require consumers to buy or rent a converter in order to receive the station. Responding to WXMI's objection, Lakeland Cable's John Smith agreed the dropping of WXMI was not related to viewer preferences, but instead reflected TCI's interest in 'cutting down on Independents to get more satellite services in.'" Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 32 (Sept. 25, 1991) ("Free Television Under Siege," INTV (May 1988)); CR VOL. I.K, EXH. 21, CR 08586.

WXTV, KDTV & KMEX

460. The record included the following:

"I am the President if Spanish International Communications Corp. ("SICC), Bahia de San Francisco Television Company ("Bahia") and the Seven Hills Television Company ("Seven Hills"). These companies are the licensees of seven UHF television stations affiliated with the SIN Television Network which broadcast entirely in the Spanish language:

WXTV/Channel 41, Paterson, New Jersey; WLTX/Channel 23, Miami, Florida; KWEX-TV/Channel 41, San Antonio, Texas; KMEX-TV/Channel 34, Los Angeles, California; KFTV/Channel 21, Hanford, CA; KDTV/Channel 14, San Francisco; and KTVW-TV/Channel 33, Phoenix. . . Each of these stations is licensed to a community heavily populated with Spanish-speaking residents; each provides its community with a complete television programming service in the Spanish language, including local public affairs and local, national and international news programming. . . Moreover, advertisers invariably ask whether the SICC, Bahia or Seven Hills station is carried on cable, to ensure that the station does in fact reach the audience represented. In fact, all three licensees now include in all sales materials a listing of the cable systems on which their stations are carried. While the existence of a Spanish market has been substantiated, advertisers are still tentative about 'buying Spanish,' and the possibility that a station may not [be] received over the air by the entire community it claims to serves—whether due to interference from buildings and terrain or to viewer disinclination to switch to its programming—often provides more than enough reason to forego this purchase. Consequently, if cable systems are not obligated to carry local television stations, SICC, Bahia and Seven Hills believe that all of their stations will be affected to some degree, but that certain of the stations and their viewers will be in serious jeopardy. WXTV and KDTV fall in the latter category. . . . Typical of our experience with those cable systems which nevertheless carry our stations was an incident with Manhattan Cable TV. At the time, Manhattan Cable provided basic cable service to more than 25,000 Hispanic subscriber households and had carried KXTV on Channel 12 of its system for more than ten years. On February 1, 1983, with

absolutely no notice to the public, to WXTV, or to its subscribers, Manhattan Cable dropped WXTV from Channel 12, substituted the Satellite News Channel, and moved WXTV to Channel W on its mid-band tier, where a converter is required for reception. Thousands of Hispanic viewers suddenly found themselves unable to view WXTV, with no idea why or how to remedy the situation. Not only did Manhattan Cable violate the Commission's rules in the way it handled this move, but, apart from demonstrating total insensitivity to its Spanish-Speaking subscribers, it had directly contravened a requirement of the franchise agreement between it and the Borough of Manhattan that WXTV be carried on Channel 12. Pressure from the press, the public and SICC's FCC filing succeeded in returning WXTV to Channel 12, but Manhattan Cable has made it clear that, given the opportunity, it will not maintain this status quo. WXTV's experiences are not unique. SICC's Los Angeles Station, KMEX-TV, in addition to litigation multiple petitions from local cable operators for special relief from must-carry rules, also was forced to do battle in 1983 with a cable system operator who had carried the station on his system for over a dozen years, but then without notice moved the station from the basic tier to a mid-band location where it could be received only with a converter. . . . While public pressure ultimately succeeded in returning KMEX-TV to a basic tier on this system, soon after the Court of Appeals decision in *Quincy* last month, Stoerr, another large cable operator in the San Fernando Valley, relegated KMEX-TV to a mid-band tier requiring a converter for reception."

Source: Comments of Spanish International Communications Corporation, Bahia De San Francisco Television Company and The Seven Hills Television Company, in MM Docket No. 85-349 at 1-6 (January 29, 1986)

(Affidavit of Reynold V. Anselmo); CR VOL. I.AA, EXH. 154, CR 15665-70.

WYED

461. The record included the following: "*WYED-TV, Goldsboro, North Carolina*—a new station, . . . reports that failure to obtain carriage on virtually all local cable systems has 'made it practically impossible to attract advertisers to sponsor its local programs,' and has resulted in its having 'little bargaining power with the syndicators' to purchase other programming. WYED states that it 'faces a strong likelihood of failure, if access to cable systems is denied.'" Source: Reply Comments of the National Association of Broadcasters, in MM Docket No. 88-138 at 7 (Aug. 8, 1988); CR VOL. I.Z, EXH. 143, CR 15368.

462. The record indicated that: "'WYED-TV Channel 17 has been denied cable carriage for the past three years on the following cable headed systems: Wilson, Kinston, LaGranger, Walnut Creek, Clinton. Smithfield and Clayton, NC, all within the 35 mile range of WYED-TV's city of license, Goldsboro. WYED-TV provides our viewing audience with many locally produced public affairs and service type programs. Additionally, the station is at a distinct disadvantage in not being carried by the systems since our livelihood is dependent on advertising revenues. Cable carriage is a must for WYED-TV if the station is expected to continue to serve our viewing public.'" Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 1 (Sept. 25, 1991) (Exhibit C); CR VOL. I.K, EXH. 21, CR 08464.

463. The record also indicated that: "WYED-TV has been denied carriage by all but one cable system in its service area. In an attempt to gain access to these cable systems, WYED-TV has offered them local programming, such as 'Hometown North Carolina,' at no charge, for

carriage on the cable system's local access channels. Unfortunately, not one of the nineteen cable systems has expressed any interest. In fact, one cable system manager stated to a principal of Group H, that his system would carry WYED-TV *only* if the government ordered it to do so. Some of these cable systems, however, are carrying the signals of broadcast stations located hundreds of miles away from Goldsboro, in another state. *See* Table 3, *Appendix*. [Cablevision of Fayetteville, Fayetteville, NC, Essex Cable TV, Franklin, NC]. Clearly, a station located in Spartansburg, *South* Carolina, well over 200 miles away from Goldsboro, *North* Carolina, will have very little interest in addressing the needs of Goldsboro or any of the communities in Wayne or Wilson counties. WYED-TV's inability to obtain carriage on all but one cable system has made it practically impossible to attract advertisers to sponsor its local programs." Source: Comments of Group H Broadcasting Corp. in MM Docket No. 88-138 at 6-7 (July 8, 1988); CR VOL. I.Z, EXH. 133, CR 15231-32.

464. The record also indicated: ". . . WYED-TV Channel 17 has been broadcasting in the Raleigh/Durham television market approximately three years and three months with only 14% cable household carriage of the total available within the television ADI. WYED-TV has exceeded the FCC recommendations in producing and airing local public affairs, issues and public service programs. Unfortunately 58% of the total television market is unable to view our creative and informative contribution because the cable operator has chosen for the public as to what and who they will view on their cable system." Source: Letter from Robert J. Peretic, General Manager, WYED-TV17 to Alfred Sikes (July 10, 1991), in MM Docket No. 90-4 at 1 (July 10, 1991); CR VOL. I.GG, EXH. 210, CR 18283.

WYHS

465. The record indicated that: "WYHS, channel 69, Hollywood, Florida, is not carried on any cable system. Although the staff members of the station have attempted to get in touch with members of the cable community to negotiate their carriage, all of the available cable companies have been unreceptive to any and all of their advances." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 9 (Sept. 25, 1991) (Exhibit B); CR VOL. I.K, EXH. 21, CR 08459.

WZDX

466. The record also indicated: "WZDX, channel 54, Huntsville, Alabama, was shifted by Cable South, Albertville, Alabama, from channel 12 where they had been since 1985 to channel 29. The station was replaced by the home shopping network; this was justified by the cable company because they receive a commission from the sales made by the home shopping network." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 7 (Sept. 25, 1991) (Exhibit B); CR VOL. I.K, EXH. 21, CR 08457.

XHBR

467. The record included the following: "On September 1, 1989, in conjunction with a general rate increase and without notice to Laredo subscribers, KBLCOM realigned several signals on the cable system in Laredo. We believe this action violated the terms of our franchise contract. Two signals in particular have caused serious concern to the consuming public and to the City. Despite the nearly unique importance of Spanish language programming in the community, Univision (SIN) was moved from Channel 7 to Channel 32, and XHBR-TV (the Mexico City broadcast signal) was moved from Channel 11 to Channel 33. Both Univision and XHBR-

TV remain available on basic, but only as part of an expanded, and significantly more costly, basic service. Which for most viewers involves both a rate increase and the need to rent a converter." Source: "Oversight Hearings" at 281 (Saul N. Ramirez); CR VOL. I.F, EXH. 33, CR 03729.

C. The FCC's Findings That By Mid-1988, Many Cable Systems Had Already Begun Dropping, Failing To Carry, Or Repositioning Broadcast Stations.

468. The FCC's 1988 "Cable System Broadcast Signal Carriage Survey Report" presented a "summary of the data compiled in response to a request from members of Congress to investigate the signal carriage practices of cable systems with respect to broadcast television stations in the absence of mandatory carriage rules." Source: FCC, "Cable System Broadcast Signal Carriage Survey Report," in MM Docket No. 90-4 (Sept. 1, 1988) at ¶ 1 (Sept. 11, 1988); CR VOL. I.P, EXH. 52, CR 10648.

469. The FCC 1988 survey had requested carriage information for the period July 19, 1985 through the date the survey response form was completed. The FCC's final compilation of the survey data was submitted to Congress on September 11, 1988. Source: FCC, "Cable System Broadcast Signal Carriage Report," (Sept. 11, 1988) (Appendix A & B); CR VOL. I.P, EXH. 52, CR 10670-74.

470. The record included the following: "On August 7, 1986, the Commission adopted a new interim set of must carry rules in response to the *Quincy* decision which were based on a proposal submitted by industry groups. . . . These rules were subsequently invalidated by the United States Court of Appeals for the District of Columbia Circuit. *See Century Communications Corp. v. FCC*, No. 86-1683, 835 F.2d 292 (D.C. Cir., Dec. 11, 1987) and Clarification *Order* issued by D.C. Cir.

Court regarding *Century Communications Corp. v. FCC*, No. 86-1683, 837 F.2d 517 (D.C. Cir., Jan. 29, 1988).

471. The record included the following summary of the Federal Communication Commission's 1988 survey responses from certain cable operators:

> "Even the incomplete and probably skewed data submitted by cable systems to the Commission, however, demonstrates graphically that denial of carriage of local television stations by cable systems is extremely widespread. The Report reveals, among other things, that:
>
> (1) Of the 912 television stations reporting, 280, *or nearly one-third*, have been denied carriage in *1,533 instances.*
>
> (2) Of the 4,303 cable systems that voluntarily disclosed data to the FCC, *869* systems have denied carriage to *704* television stations in *1,820* instances. Moreover, 279 of the stations dropped, involving 753 instances of non-carriage, were eligible for must-carry status even under the limited 'compromise' post-*Quincy* must-carry rules agreed upon by both the cable and broadcast industries.
>
> (3) *241* of the reporting cable systems have denied carriage to *three or more* local stations, and *113* systems have denied carriage to *four or more* stations.
>
> (4) The vast majority of local independent stations dropped by responding cable systems—at least 378 of 485 (78%)—were located within 50 miles of the cable headend.
>
> (5) By far the most frequent replacement for a dropped local television station is a basic cable network—the program services in which cable operators often own equity interests and/or profit from local advertising sales.

> (6) *974* of the cable systems who supplied information to the FCC reported that they had repositioned one or more local station signals in almost *3,000 instances.* Moreover, only *15%* of the instances of repositioning were attributed to 'technical' as opposed to 'marketing' reasons.
>
> (7) In 326 instances, reporting television stations made cash payments or supplied other consideration (usually equipment) in return for continued carriage on cable. At least 120 of these instances involved cash payments, and in two cases these payments exceeded $45,000 per year."

Source: Supplemental Comments of the Association of Independent Television Stations, Inc. in MM Docket No. 88-138 at 3-4 (Dec. 21, 1988); CR VOL. I.AA, EXH. 148, CR 15480-81.

472. The FCC survey indicated that of the 186 commercial independent stations responding to the survey, 83 reported having been dropped or denied carriage by cable systems. This included 389 incidences of carriage denials before stations that commenced operation on or after July 1, 1985, 270 incidences of cable systems dropping broadcast stations, and 51 incidences of denial of carriage to stations that began operations prior to July 1, 1985. Source: "Hearings on Competitive Problems" at 385 (Table 1); CR VOL. I.H, EXH. 14, CR 05318.

473. The FCC survey indicated that 280 of the 912 broadcast stations responding to the survey reported being dropped or denied carriage, and that this involved a total of 1,533 incidences of drops or carriage denials (776 of these incidences involved drops). Source: "Hearings on Competitive Problems" at 385 (Table 1); CR VOL. I.H, EXH. 14, CR 05318.

474. Table 5 of the FCC survey reported data indicating the relationship between the incidence of reported drops/denials and the channel capacity of the system

involved. Source: "Hearings on Competitive Problems" at 390 (Table 5); CR VOL. I.H, EXH. 14, CR 05323.

475. When the results in each channel capacity column in Table 5 of the FCC survey are totalled (and percentages derived), the relationship between the incidence of reported drops and carriage denials by the cable systems reporting and the channel capacity of those systems is as follows: (a) 38 out of 525 cable systems (7.2%) with channel capacity of 1-12 channels reported dropping/denying carriage to one or more broadcast station; (b) 90 out of 876 cable systems (10.3%) with channel capacity of 13-20 channels reported dropping/denying carriage to one or more broadcast stations; (c) 537 out of 2207 cable systems (24.3%) with channel capacity of 21-35 channels reported dropping/denying carriage to one or more broadcast stations; (d) 185 out of 567 cable systems (32.6%) with channel capacity of 36-54 channels reported dropping/denying carriage to one or more broadcast stations; and (e) 8 out of 63 cable systems (12.7%) with channel capacity of 55 or more channels reported dropping/denying carriage to one or more broadcast stations. Source: "Hearings on Competitive Problems" at 390 (Table 5) (numbers compiled from information provided in FCC table for systems in each channel category); CR VOL. I.H, EXH. 14, CR 05323.

476. Table 6 of the FCC survey indicated the relationship between the incidence of reported drops and carriage denials reported by cable systems and the size of the cable system reporting this information (by number of subscribers). Source: "Hearings on Competitive Problems" at 390 (Table 6); CR VOL. I.H, EXH. 14, CR 05323.

477. When the results in each system size column in Table 6 of the FCC survey are totalled (and percentages derived), the relationship between the incidence of reported drops/denials by the cable systems reporting and the size of those cable systems is as follows: (a) 145 out

of 1,587 cable systems (9.1%) with fewer than 1,000 subscribers reported dropping/denying carriage to one or more broadcast stations; (b) 178 out of 787 cable systems (22.6%) with at least 1,000 but fewer than 2,500 subscribers reported dropping/denying carriage to one or more broadcast stations; (c) 123 out of 527 cable systems (23.3%) with at least 2,500 but fewer than 5,000 subscribers reported dropping/denying carriage to one or more broadcast stations; (d) 139 out of 464 cable systems (30.0%) with at least 5,000 but fewer than 10,000 subscribers reported dropping/denying carriage to one or more broadcast stations; (e) 158 out of 473 cable systems (33.%) with at least 10,000 but fewer than 25,000 subscribers reported dropping/denying carriage to one or more broadcast stations; and (f) 91 out of 300 cable systems (30.3%) with 25,000 subscribers or more reported dropping/denying carriage to one or more broadcast stations. Source: "Hearings on Competitive Problems" at 390 (Table 6) (numbers compiled from information provided in FCC table for systems in each system size category); CR VOL. I.H, EXH. 14, CR 05323.

478. 313 of the 912 broadcast stations responding to the 1988 FCC survey indicated that they had been repositioned by one or more cable systems. A total of 1,274 incidences of channel repositioning were reported by these stations. 131 out of 452 network affiliates reported that they had been repositioned; 82 out of 186 commercial independent stations reported that they had been repositioned; 88 out of 237 non-commercial ETV (PBS) reported that they had been repositioned; and 12 out of 37 "other" stations (relig., specialty) reported that they had been repositioned. Source: "Hearings on Competitive Problems" at 394 (Table 9); CR VOL. I.H, EXH. CR 05327.

479. 504 cable systems responding to the 1988 FCC survey reported that they had repositioned one or more commercial network affiliates (involving 946 incidences

of repositioning); 549 cable systems reported that they had repositioned one or more commercial independent stations (involving 916 incidences of repositioning); and 432 cable systems reported that they had repositioned one or more non-commercial ETV (PBS) stations (involving 541 incidences of repositioning). Source: "Hearings on Competitive Problems" at 395 (Table 10); CR VOL. I.H, EXH. 14, CR 05328.

480. The record also included extrapolations of this data to the total universe of cable systems: "If one makes the extremely conservative and optimistic assumption that the incidence of non-carriage of local stations on the part of cable systems that did *not* disclose information to the FCC is roughly the same (*and* that none of the reporting cable systems understated their non-carriage of local stations), it would mean that approximately *1,700* cable systems have denied carriage of local free television stations in approximately *3,600* instances." Source: "Hearings on Cable Television Regulation" at 874-75 (Statement of James B. Hedlund); CR VOL. I.J, EXH. 18, CR 07878-79.

481. The record also included the following: "As a result, only about 50% of the cable systems surveyed returned 'usable questionnaires.' This raises the concern that 'those not responding to the survey may represent a specific subset of the sample, thereby building into the survey analysis a particular response bias.' It is not unreasonable to assume that the 'bias' of those cable systems choosing not to respond to the FCC's survey was that they had extensively engaged in not carrying, dropping, and/or repositioning local stations and did not want their numbers included in a report to be submitted to a Congress investigating whether cable carriage and channel positioning should be re-regulated. Even if the practices of cable systems not responding to the survey paralleled those that did respond, it reasonably may be assumed that approximately 1,728 cable systems failed to carry or

denied carriage to local stations involving 3,640 instances of non-carriage, and that some 1,948 cable systems repositioned local stations a total of 4,990 times." Source: Comments of National Association of Broadcasters Regarding FCC and NCTA Cable Carriage Surveys in MM Docket No. 88-138 at 4-5 (Dec. 21, 1988); CR VOL. I.AA, EXH. 149, CR 15499-500.

482. Congress was advised that: "The over 4,000 cable systems that refused to respond [to the FCC survey] are more likely to be the systems that had more to hide than those that voluntarily disclosed local signal carriage information." Source: "Hearings on Cable Television Regulation" at 873 (Statement of James B. Hedlund); CR VOL. I.J, EXH. 18, CR 07877.

483. Congress was also aware of the following limitation in the FCC survey data: "Finally, it is evident that some of the responding parties misunderstood or misapplied the mandatory signal carriage rules. These rules are complex requiring information on market rankings and boundaries (35-mile zones), signal contour locations, and county or community audience survey information). Source: "Hearings on Cable TV Consumer Protection Act of 1989" ¶ 6 at 382; CR VOL. I.H, EXH. 14, CR 05315.

D. Evidence That NCTA's Rebuttal Study Was Both Limited and Flawed.

NCTA's Study Focused on Carriage During Approximately a 12-14 Month Period in 1987-88; For Almost Half of This Period, Cable Systems Were Required BY LAW to Carry the Broadcast Stations NCTA's Survey Studied

484. The record included the NCTA survey summary, which explains that: "The survey respondents were asked to provide data on carriage and channel position changes

made since June 10, 1987, the date when the FCC's interim rules went into effect. . . . The surveys were mailed out on June 20, 1988. As of August 12, the final deadline for returning completed surveys to Price Waterhouse, 3,966 surveys had been returned." Source: "Broadcast Station Carriage Survey," included in MM Dock. No. 88-138 at 5 (Sept. 14, 1988); CR VOL. I.AA, EXH. 146, CR 15432.

485. The record also indicated that must-carry requirements for "qualified" broadcast stations were adopted in November 1986, and were in effect through much of the period of the NCTA survey: "In November 1986, the FCC adopted an interim set of mandatory carriage regulations . . . On December 11, 1987, the U.S. Court of Appeals for the D.C. Circuit struck down the Commission's interim must carry rules, finding them again at odds with the First Amendment." Source: "Broadcast Station Carriage Survey," filed in MM Dock. No.. 88-138 at 3 (Sept. 14, 1988); CR VOL. I.AA, EXH. 146, CR 15429-30.

The NCTA Survey Focused on Cable Action During a Brief Period of Time in Which The Industry Was Aware That its Conduct Was Being Investigated by Congress and the FCC.

486. The record included the following:

". . . NCTA's survey was mailed to respondents on June 20, 1988, with an initial requested reply date of July 8, 1988, and a final cut off response date of August 12, 1988. The final mandate of the U.S. Court of Appeals for the District of Columbia overturning the Commission's *post-Quincy* must carry rules was issued on July 11, 1988 (see copy attached). Hence, it appears that many of the cable systems responding to NCTA's survey did so while the *post-Quincy* rules were still technically in effect.

Moreover, at the time these responses were being provided, legislation had been introduced to re-impose must carry regulations and the cable industry was under investigation by the House Telecommunications and Senate Antitrust Subcommittees. Hence, it cannot seriously be asserted that NCTA's survey results in any way reflect how the cable industry has 'acted . . . in the absence of must carry regulation.'"

Source: Comments of National Association of Broadcasters Regarding FCC and NCTA Cable Carriage Surveys in MM Docket No. 88-138 at 7-8 (Dec. 21, 1988); CR VOL. I.AA, EXH. 149, CR 15502-03.

The Record Also Indicated that a Substantial Percentage of the Cable Systems Contacted for the NCTA Survey Declined to Respond

487. The record indicated that: "Another possible partial explanation for the gulf between the two studies is that only 39 percent of the cable systems surveyed by NCTA returned their questionnaires. Thus, notwithstanding NCTA's assertion that 'it is reasonable to assume that the survey data are representative of cable system carriage of broadcast stations,' a very significant 'response bias' may be present in the NCTA Report. Put another way, the more telling information regarding the degree of cable non-carriage of local free television stations may remain in the hands of the 61 percent of the nation's cable systems that did not deign to respond to NCTA's survey." Source: Petition for Notice of Inquiry by INTV in MM Docket No. 89-600 at 7 (Dec. 21, 1988); CR VOL. I.R, EXH. 86, CR 11516.

488. The record also included the following:

"While NCTA's survey reportedly attempted to obtain responses from all cable systems, the response rate (somewhere between 38.5% and 47.1%) was

less than 50%. As the FCC correctly observed in its Cable Report, '. . . in survey research a common concern is the notion that those not responding to the survey may represent a specific subset of the sample, thereby building into the survey analysis a particular response bias.' As applied to NCTA's Survey, a not unreasonable assumption is that the 'bias' of cable systems not responding to the survey was that they had extensively dropped, failed to carry, and repositioned qualified stations and did not want their numbers included in a survey that could be used to justify the reimposition of carriage and channel repositioning requirements. Even assuming the absence of such bias, if the responses of non-respondents were the same as those responding to the survey, presumably there were, during the NCTA survey period, at a minimum, twice as many, or *660* 'instances' in which qualified stations were dropped or not carried. In fact, the results of the FCC Report, which were based on a 50% cable response rate, and which found *753* instances of qualified stations under the interim rules being dropped or denied carriage, suggest that had all cable systems replied, the number of instances of qualified stations being dropped or denied carriage could be double and be in the range of 1506."

Source: Comments of National Association of Broadcasters Regarding FCC and NCTA Cable Carriage Surveys in MM Docket No. 88-138 at 9-10 (Dec. 21, 1988); CR VOL. I.AA, EXH. 149, CR 15504-05.

The NCTA Survey Did Not Study The Full Universe of Broadcast Stations That Congress Sought to Protect

489. The record included the following:

". . . the FCC and NCTA surveys sought different information: The FCC sought to determine the number of local stations entitled to carriage under the pre-*Quincy* must-carry rules that are being denied carriage, while the NCTA survey sought to measure the degree of non-carriage of a far narrower class of local stations that were 'qualified' for carriage under the compromise 'post-*Quincy*' must-carry rules that were invalidated in *Century*. It may also be that, despite the NCTA survey's fair definition of 'qualified' stations under the post-*Quincy* rules, some respondents did not list non-carriage of such stations that were nevertheless ineligible for mandatory carriage under these complex rules. Thus, the NCTA Report does not measure non-carriage of 'local' stations as that term was understood by the Commission for 20 years, but instead purports to measure non-carriage of a smaller subset of local stations under an industry compromise that was acceptable to NCTA and most of its members in 1986."

Source: Supplemental Comments of the Association of Independent Television Stations, Inc. in MM Docket No. 88-138 at 6 (Dec. 21, 1988); CR VOL. I.AA, EXH. 148, CR 15483.

490. The record also included the following methodological concern: "INTV submits that the FCC report may be the more accurate measure [compared with the NCTA survey], inasmuch as virtually all cable systems were familiar with their local signal carriage obligations in effect for two decades until July 1985, while many systems might be unfamiliar with and therefore inaccurate in reporting 'qualified' station carriage under rules that were in effect only 16 months, and even then were under the cloud of a judicial challenge." Source: Supplemental Comments of the Association of Independent Television Stations, Inc. in MM Docket No. 88-138 at 6-7 n.18 (Dec. 21, 1988); CR VOL. I.AA, EXH. 148, CR 15483-84.

491. The record also indicated:

> "In verifying the results of the NCTA Survey, Price Waterhouse made the rather incredible discovery that 'some cable system operators were unaware of all of their local broadcast stations and others included only local broadcast stations that had specifically requested and were denied carriage in their response to the number of broadcast stations they opted not to carry.' Based on this discovery, Price Waterhouse concluded that 'systems tended to understate the number of broadcast stations they opted not to carry.'
>
> Other than the conclusion that 'the incidence of systems opting not to carry stations reported in the survey exceeds the incidence of stations requesting and being denied carriage but falls short of the incidence of local stations not being carried,' no clue is provided as to the actual or projected number of cable systems that understated the number of qualified stations not carried or the number of instances where there was a failure accurately to report this data. Moreover, to the extent that the tendency to understate the number of qualified stations not carried was discovered as a result of auditing surveys compiled by MSOs (Survey, Appendix 3, p. 7), it can reasonably be assumed that smaller, less sophisticated and less knowledgeable system operators would have had an even greater tendency to omit qualified stations from their questionnaires."

Source: Comments of National Association of Broadcasters Regarding FCC and NCTA Cable Carriage Surveys in MM Docket No. 88-138 at 10-11 (Dec. 21, 1988); CR VOL. I.AA, EXH. 149, CR 15505-06.

492. The record also raised the following methodological issue:

> "An essential element to the validity of NCTA's results, both as to the number of qualified stations that are not being carried or that have been repositioned, as to the number of 'instances' in which qualified stations have been dropped, denied carriage or repositioned is that survey respondents were provided with an accurate definition of what constituted a 'qualified station.' Under the *post-Quincy* rules, commercial stations 'that commenced operation on or after July 19, 1985 but before June 10, 1987' were considered qualified stations through June 10, 1988, without meeting the viewing standard, if they met the 50 mile and good quality signal requirements. The definition of 'qualified station' in NCTA's Survey simply omits this fact. It states only that '[*n*]*ew* commercial stations were exempt from the viewing standard requirement . . . for a one year period,' leaving the respondent to guess as to one year from when? It would not seem unreasonable that survey respondents reading NCTA's definition of 'qualified station' would interpret it as meaning either that the new station exemption from the viewing requirement only applied to stations commencing operation after June 10, 1987, or that, for example, the exemption for a station commencing operation in July, 1985 would have expired in July 1986. Either of these erroneous interpretations would have resulted in understating an unknown number of qualified stations on an unknown number of cable systems."

Source: Comments of National Association of Broadcasters Regarding FCC and NCTA Cable Carriage Surveys in MM Docket No. 88-138 at 11-12 (Dec. 21, 1988); CR VOL. I.AA, EXH. 149, CR 15506-67.

Even Though The NCTA Survey was Limited to Carriage and Repositionings of "Qualified Stations" For a Very Brief Time Period While a Congressional Investigation Was Pending, the NCTA Survey Results Raised Troubling Issues

493. The survey results reported by NCTA indicated that during the time period covered by the survey: "6% of the systems with qualified stations, serving 8% of the subscribers, have either dropped or opted not to carry a qualified station." Source: "Broadcast Station Carriage Survey," filed in MM Dock. No. 88-138 at 9 (Sept. 14, 1988); CR VOL. I.AA, EXH. 146, CR 15436.

494. The record also included the following information about the NCTA survey:

> "[W]hile NCTA's survey touts the fact that its respondents reported 'only' 330 'instances' where they failed to carry or dropped qualified stations, the survey's definition of an 'instance' (*i.e.* one television station not carried by one cable system) makes no distinction between those instances where a cable system was serving 100,000 subscribers. What NCTA fails to emphasize is the fact that the respondents to its survey revealed that they were denying the benefit of receiving the signal of at least one station that qualified for carriage under the *post-Quincy* rules to almost *2.5 million subscribers*, and that projecting the survey results to the total universe of subscribers suggests that *3.6 million* subscribers are being denied the benefit of receiving at least one qualified station."

Source: Comments of National Association of Broadcasters Regarding FCC and NCTA Cable Carriage Surveys in MM Docket No. 88-138 at 8 (Dec. 21, 1988); CR VOL. I.AA, EXH. 149, CR 15503.

495. The survey result reported by NCTA indicated that 9% of cable systems carrying qualified stations, involving 17% of subscribers, had repositioned a "qualified" station during the time period studied. The NCTA's report of the study stated that: "Approximately 91% of the system carrying qualified stations, representing 83% of the subscribers, reported no repositioning of qualified stations since June 10, 1987." Source: "Broadcast Station Carriage Survey," filed in MM Dock. No. 88-138 at 15 (Sept. 14, 1988); CR VOL. I.AA, EXH. 146, CR 15442.

496. The following information was in the record:

> "The results of NCTA's Survey relating to the channel repositioning of qualified stations is misleading and incomplete in the following respects:
>
> —The survey only takes into account those repositionings of qualified stations that took place between June 10, 1987 and approximately June to August of 1988. NAB and INTV's comments and the FCC's survey suggest that widespread repositioning was taking place between July 1985 and June 1987.
>
> —The survey fails to include in the number of 'instances' of repositioning, the number of times that a station has been repositioned on a given cable system. Responses to an NAB survey and other comments in this proceeding reflect that stations have been repositioned as many as 3 to 5 times on the same system.
>
> —The long form survey asked respondents; 1) if repositioned stations were now being carried on the system's basic tier; 2) the primary reason why a station was repositioned and 3) what programming was now being carried on the channel from which the station was repositioned. *None of the responses to these inquiries are included in the survey results.*

As noted previously, responses to the FCC Survey question regarding why stations were repositioned indicated that 85% of the cable respondents cited 'marketing decisions,' thereby suggesting that the overwhelming reasons why stations are repositioned have to do with the station's competitive position vis-a-vis the cable operator.

—The survey touts the fact that 'almost 80% of the channel repositions reflect stations that were repositioned to cable channels equivalent to or lower in number than the stations' off-air channel assignments.' What is omitted is how many times stations were repositioned upward to place them on their off-air channel. For example, NAB's comments cited an instance where a local cable system threatened to reposition the three UHF affiliates in Bakersfield, California from VHF positions where they had been for years to their UHF on-channel positions and to replace them with distant affiliates with whom the cable operator did not compete. Such moves to 'on-channel' positions can hardly be deemed 'broadcaster friendly.' The survey also states that 44% of the instances of repositioning involved instances where stations were moved from a cable channel with which they had been identified for years to a different channel where confused subscribers would have difficulty finding them."

Source: Comments of National Association of Broadcasters Regarding FCC and NCTA Cable Carriage Surveys in MM Docket No. 88-138 at 17-19 (Dec. 21, 1988); CR VOL. I.AA, EXH. 149, CR 15512-14.

E. Evidence That These Adverse Actions Against Broadcast Stations Were Not Based On Subscriber Preferences.

497. The record indicated that: "Channel shifts are *not* a product of consumer demand. In virtually every instances, the local stations shifted are more popular (higher ratings), then the cable program services that replace them." Source: "Hearings on Cable Television Regulation" at 800 (Statement of James B. Hedlund); CR VOL. I.J, EXH, 18, CR 07884.

498. The record indicated that: "Often the cable companies publicly rationalize their channel positioning decision based on 'consumer surveys'—surveys which are of highly dubious reliability and often are contrary to readily available consumer preference evidence such as existing rating service data provided by Nielsen and Arbitron." Source: "Hearings on Competitive Issues" at 698 (statement of John Siegel) CR VOL. I.C, EXH. 8, CR 02037.

499. The record also indicated that: "By a better than six to one margin, Americans say broadcast television has better local news (probably because few cable channels carry local news programs). And by a 12 point margin, the public says that regular television provides better national news coverage. *See* 1989 TIO/ROPER REPORT, at 5. Source: "Hearings on Cable Television Regulation" at 862 n.2 (Statement of James B. Hedlund); CR VOL. I.J, EXH. 18, CR 07866.

500. The record indicated that: "The fact is that with few exceptions, the lowest rated off-the-air signals still attract higher audiences on cable systems than do cable program services." Source: "Hearings on Cable Television Regulation (Part 2)" at 106-07. (Statement of Thomas L. Goodgame); CR VOL. I.I, EXH. 16, CR 06273-74.

501. The record included the following: "Even while the must-carry rules were in effect, cable companies began to reshuffle channels of local broadcasters. This continues despite clear consumer preference for the local broadcaster's fare over the cable channel which replaced it. I know of no channel repositioning that result in anything other than a local station being moved out by a lesser-viewed cable program. The local station was either dropped or moved to a higher channel. Consumers who were accustomed to viewing that local station on its prior channel were disadvantaged or even displaced if their T.V. set could not receive the higher channel on which their preferred programming now appears." Source: Hearings on Competitive Issues" at 697 (Statement of John Siegel); CR VOL. I.C, EXH. 8, CR 02036.

502. The record indicated that: "Cable operators are making arbitrary program decisions that are solely based on financial gains for the system. When given choices via consumer surveys, the cable operators disallow selections that are competitive with cable. We requested many times of all the cable systems in the region that Channel 8 be included in their subscriber surveys. Although they have conducted many surveys in the past three years, Channel 8 has never been included." Source: Comments of Paul V. Engle, Channel 8 South Jersey Television, Inc. in MM Docket No. 90-4 at 3 (Sept. 10, 1991); CR VOL. I.P, EXH. 56, CR 10700.

503. The record indicated that: "TCI's Speck claimed that the [channel alignment] changes are in response to a survey that included 2,000 Seattle cable customers. Those surveyed were asked what types of programs they prefer and if they would like a system that would get rid of the cable switch-box, allowing them to use their remote controls. But those questioned were not asked about the changing of channel numbers, and only new, 'cable-friendly' T sets allow full access to cable stations via

remote controls. Councilwoman Jeanette Williams voiced doubt that the survey, and not economic gain, really lay behind TCI's proposal." Source: "Hearings on Competitive Issues" at 664 (*The Seattle Post-Intelligence*, Dec. 4, 1986); CR VOL. I.C, EXH. 8, CR 02003.

504. The record indicated that: "In fact, Chris-Craft knows of no instance of channel repositioning that has resulted in replacement of its local stations on that channel with anything other than a cable program less popular to cable subscribers." Source: Comments of Chris-Craft Industries, Inc. in MM Docket No. 89-600 at 11 (March 1, 1990); CR VOL. I.S, EXH. 99, CR 11971.

505. The record indicated that: "In the main, cable operators do not regard themselves as "gatekeepers." At the same time, however, they believe they should make programming decisions based on their perceptions of what local customers want. . . . Very often, these perceptions are not founded on local research. If research is conducted, it is done only sporadically and often is commissioned by the parent MSO, with little or no involvement at the local system level. . . . In the vast majority of cases, system managers do not ultimately decide what services will be included in their lineup. Such decisions are most frequently made at the MSO level, although many MSOs encourage recommendations from their system managers." Source: Reply Comments of the Association of Independent Television Stations, Inc. in MM Docket No. 90-4 at 24 (Oct. 25, 1991) (Exhibit G); CR VOL. I.Q, EXH. 81, CR 11456.

506. The record also indicated that in November, 1986, TCI "notified the San Francisco area Independent stations of its plans to shift their channel locations. TCI claimed its move was based on a 'comprehensive survey of subscriber attitudes' and was intended to 'provide the most popular services on the first twelve channels.' KTVU —which broadcasts on channel #2—and KBHK—which

broadcasts on channel #44 but has been carried on cable channel #12 for over 20 years—were to be repositioned in the upper end of the cable dial. . . . Even though KTVU and KBHK are the highly-rated #1 and#2 Independents in this, the 4th largest television market in the country, TCI planned to move them out of the first twelve cable channels. In their place TCI planned to substitute cable services on which it sold advertising and—in several instances—in which TCI held an ownership position." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Dock. No. 90-4 at 9 (Sept. 25, 1991); CR VOL. I.K, EXH. 21, CR 08563.

507. The record indicated that: "Second, it is our experience that cable operators today are making carriage decisions almost exclusively on the basis of financial self-interest. Numerous cable operators with whom Telemundo has dealt appear indifferent to the nature of Telemundo's programming and its appeal to existing or potential subscribers. Instead, they are primarily interested in determining how much Telemundo is willing to pay to gain access to their subscribers. Telemundo's experience suggests that cable operators today are accepting or rejecting new services based largely upon how much they can extract from the programmer." Source: Testimony of Telemundo Group, in FCC Cable Hearing, Orlando, FL, included in record in MM Docket No. 89-600 at 3 (March 2, 1990); CR VOL. I.R, EXH. 82, CR 11465.

508. The record indicated that: "While a cable system could not today drop all local signals without losing many, if not most of its subscribers, the absence of any local competition makes it possible for a cable system to drop one or more weaker stations in favor of cable programming from which it derives greater financial benefits without losing subscribers. Further, NAB is not aware of an instance . . . in which a local station was dropped or repositioned in favor of a cable service having higher ratings." Source:

Cable Television Regulation (Part 2): Attachments to NAB Testimony in Hearings Before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce, 101st Cong., 2d Sess. at 33-34 (May 16, 1990) (NAB Reply Comments of the FCC); CR VOL. I.L, EXH. 22, CR 08884-85.

509. The record indicated that: "In cable households, local stations have ratings 5 times greater than ESPN, USA Network, WTBS, CNN and CNN/Headline News *combined*. *Broadcasting*, May 8, 1989 at 72." Source: Cable Television Regulation (Part 2): Attachments to NAB Testimony in Hearings Before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce, 101st Cong., 2d Sess. at 34 n.49 (May 16, 1990) (NAB Reply Comments of the FCC); CR VOL. I.L, EXH. 22, CR 08885.

510. Congress also received the following testimony:

> "Even while the must-carry rules were in effect, cable companies began to reshuffle channels of local broadcasters. This continues despite clear consumer preference for the local broadcaster's fare over the cable channel which replaced it. I know of no channel repositioning that resulted in anything other than a local station being moved out by a lesser-viewed cable program. The local station was either dropped or moved to a higher channel. Consumers who were accustomed to viewing that local station on its prior channel were disadvantaged or even displaced if their T.V. set could not receive the higher channel on which their preferred programming now appears."

Source: "Hearings on Competitive Issues" at 697 (Memorandum Re: Joint Comments of the Monopoly of Cable Television Systems and the Demise of Independent Free Television (March 17, 1988)); CR VOL. I.C, EXH. 8, CR 02036.

511. The record indicated that: "Lack of control over carriage decisions may be a reason that many do not see themselves as gatekeepers. MSOs exert extensive control over carriage decisions, though the amount of that control varies from company to company. One programmer, who for obvious reasons want to remain anonymous, decried the situation. 'MSOs like Jones and Century retain absolute authority over carriage. Companies like Comcast and Adelphia exercise tight corporate control, despite all of their talk about decentralization. We speak with system managers about carrying out service, and we get positive feedback. But then all too often, the manager says he is powerless to do anything about it.'" Source: Reply Comments of the Association of Independent Television Stations, Inc. at MM Docket No. 90-4 at 24 (Oct. 25, 1991) (Exhibit G); CR VOL. I.Q, EXH. 81, CR 11456.

512. The record indicated that: "In combination, these instances [of drops and other adverse activity] exhibit characteristics which legislation should address. Lack of notice to allow 'damage control' of the disruption to viewers, the station and its advertisers is one such characteristic. Another is replacement of a local station with a made-for-cable service typically owned by the operator itself. Some of the actions also suggested decisions made as part of an overall scheme devised in the multiple system owner's headquarters office to be applied on a blanket basis regardless of circumstances, needs or interests in local communities." Source: "Hearings on Must Carry" at 169 (Statement of Brian G. Holton); CR VOL. I.F, EXH. 12, CR 04179.

513. The record included the following: "KTSF was dropped by the TCI systems in Sunnyvale and San Mateo on December 23, 1986. At that time the Asian population was 16% in Sunnyvale and 8% in San Mateo. Other local stations were also dropped at the same time. All of the replacement programming was made-for-cable programming services. In this instance, in contrast to the Millbrae system (discussed below), TCI has been unresponsive to expressions of preference for KTSF from viewers and community organizations, and to requests from elected officials that the action be reconsidered. TCI cited a subscriber survey as justification for dropping KTSF, but has conceded that it was done only in English, effectively eliminating any response from the station's core audiences. The system promised to do another survey, this time multilingual, within six months, but that survey has yet to be done to Lincoln's knowledge." Source: "Hearings on Must Carry" at 167 (Statement of Brian G. Holton); CR VOL. I.F, EXH. 12, CR 04177.

514. The following was included in the record: "WOFL has also suffered a repositioning problem with Lake County cablevision, serving 25,000 subscribers in Lake and Marion County, Florida. In the Fall of 1985 we became aware of an impending channel line-up switch which would have moved us from channel 11 to channel 27 on a 28 channel system. After numerous phone and face-to-face meetings with the operator, he consented to place us on channel 12. The discussions were unique as the System Manager first intimated we could provide tickets to the Disney 15th anniversary Party in return for the channel slot of our choice, and when those would not be produced he changed the request to backstage passes to a Journey concert at the Lakeland Civic Center, which we also did not provide. Finally, beginning August 1, 1987, they announced they were moving us off 12 and up to 27 on a 30 channel system, placing MTV in the 12 slot. Lake County Cablevision now stacks all local Independent stations between 27 and 31, with the PBS affiliate on 15. The System Manager informed us that Scripps-Howard Cable had received a substantial discount rate from MTV in return for placing MTV in a VHF position on all of Scripp's systems nationally. It should be pointed out that Lake County is the 'oldest' county

in Central Florida with 43.9% of Lake County residents aged 50 or above and 25.4% aged 65 or older (Source—1980 U.S. Census), hardly the audience whose local service would seem to be enhanced by MTV on channel 12. Again, WOFL is the first alternative to the major networks in Lake County, gathering a 6 share/58% net weekly circulation in cable homes and a 7/51 in non-cable homes." Source: Comments of the National Association of Broadcasters, Appendix Volume, in MM Docket No. 88-138 at 3-4 (July 8, 1988) (Letter from Tom Meek); CR VOL. I.Y, EXH. 128, CR 15026-27.

515. The record indicated that: "In response to inquiries from Post-Newsweek and viewers, Comcast stated that 'a random survey of our subscribers indicated that WPLG was one of the least viewed, duplicated network stations.' Post-Newsweek has repeatedly requested details of this survey, which is at odds with published ratings surveys, but the cable system has not provided them." Source: Comments of Post-Newsweek Stations, Inc. in MM Docket No. 88-138 at 3 (July 8, 1988); CR VOL. I.Z, EXH. 139, CR 15275.

F. Evidence That Adverse Actions By Cable Systems Would Be Under-Reported Because Of Individual Broadcasters' Reluctance To Antagonize Cable Systems That Served As Gatekeepers To Cable Households.

516. The record included the following example of this:

> "My wife and I have undergone a living hell since the strikedown of must-carry on December 11, 1987. We are on three of the four cable systems in Columbus, having been taken off by Coaxial Communications Cable on approximately January 20. We are being carried by All American ATC out of Denver, Warner and Telemedia. We are very appreciative to be carried by these three systems and would rather

> not comment on them due to the extreme sensitivity of the problems, sir.
>
> I will comment on Coaxial, since they have no intention of putting us back on, although we have offered consideration in the way of time for them to sell, assumption of any copyright liability. They have additional promotional time for their programming, if they would like it. They, the president and majority owner will not even meet with us to work out our differences. They only want to exchange letters with much doubletalk and confusion to obscure any real truth on the issues between us."

Source: "Hearings on Competitive Issues" at 690 (Statement of Wendell Triplett); CR VOL. I.C, EXH. 8, CR 02029.

517. The record indicated that: "Many new stations have been reluctant to disclose their difficulties with cable for fear of alarming advertisers, investors and lenders." Source: *CRT Reform and Compulsory Licenses: Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, House Committee on the Judiciary*, 99th Cong., 1st Sess. at 488 (June 19, 1985); CR VOL. I.B, EXH. 6, CR 01168.

In Some Cases, Stations Did Not Know the Nature or Details of Adverse Actions by Cable Systems

518. The record included the following information:

> "KDRV-12 (ABC), Medford, OR, Collen Clark, 'Don't talk about it, they just do it. They have no obligations to let us know. I know for sure of one cable system dropping us and suspect as many as four may have dropped us. Jones Intercable, Winston, OR is the cable system we know dropped us. Found out just by chance and I found out they went exclusively with cable programming added (I believe

national networks) and we were dropped for the weather channel.' "

Source: Comments of the National Association of Broadcasters, Appendix Volume, in MM Docket No. 88-138 at 1 (July 8, 1988) (KDRV-12); CR VOL. I.Y, EXH. 128, CR 14975.

519. The record also included the following:

"WFUM-28 (PBS), Flint, MI, Gordon E. Lawrence, 'Owosso-Taft (TCI) is the one we know for sure dropped us. We're on 21 different cable systems, it's hard to keep up and get information out of them. We do have unconfirmed reports our channel was changed on some cable systems—Group TCI—small cable system in Bay City and Saginaw.' 1 system dropped (within 50 miles/DK viewing)."

Source: Comments of the National Association of Broadcasters, Appendix Volume, in MM Docket No. 88-138 at 1 (July 8, 1988) (WFUM-28 (PBS)); CR VOL. I.Y, EXH. 128, CR 14997.

G. Evidence That Adverse Actions Against Broadcast Stations Would Increase In The Future If Must Carry Legislation Was Not Enacted.

1. *The Incentives To Favor Cable Programming Over Broadcast Stations Had Increased Dramatically And Would Continue To Do So.*

520. *See* Section V.A.2 and V.A.3 *supra* (discussing advertising competition).

521. *See* Section V.B.1 *supra* (discussing vertical integration.

522. *See* Section V.C.4 *supra* (discussing growing availability of cable programming networks).

523. For example, the record included the following judgment by Commissioner Quello of the Federal Communications Commission:

"I believe the abuses occurring today are just the 'tip of the iceberg'. These activities come at a time when the cable industry is just beginning to recognize the importance of local advertising. In addition, the leaders of the industry have been statesmen in attempting to keep the industry from abusing it's new found power. Experience tells me that the natural competitive incentives will not be restrained forever. As soon as the political spotlight shifts from the cable industry, its unbridled power will be brought to bear."

Source: "Hearings on Cable Television" at 322 (Statement of James H. Quello); CR VOL. I.D, EXH. 9, CR 02408.

2. *Warnings By Cable Industry Leaders Against Taking Adverse Actions Against Broadcast Stations While The FCC And Congress Were Considering Imposition Of Must Carry Requirements.*

524. The record indicated that: "It must be remembered that leaders in the cable industry have attempted to restrain the industry from engaging in massive channel shifting. As noted previously their efforts have not been completely successful. Nevertheless, once cable legislation is enacted, and the scrutiny of Washington fades, cable's predatory nature will be unleashed. An 'on channel policy' would simply be the excuse to trigger additional anti-competitive behavior." Source: "Hearings on Cable Television Regulation" at 900 n.81 (Statement of James B. Hedlund); CR VOL. I.J, EXH. 18, CR 07904.

525. The record included the following: "One final matter clearly warns of the likely result if the mandatory carriage rules are forever gone. Leaders of the cable tele-

vision industry, sensitive to the backlash which would result if cable operators suddenly exercised their newfound authority not to carry local television stations, have urged cable operators not to be too precipitous. Barely two months after the court's decision in the *Quincy* case, on September 18, 1985, Mr. Edward Allen, Chairman of the National Cable Television Association, cautioned the Washington Cable Club that '[a] wise man doesn't insult the alligators until he's across the river.' Albeit good advice, Mr. Allen's words leave the clear impression that once the cable industry has crossed the river—that is, achieved final elimination of mandatory carriage—local broadcasters can expect to have their signals removed from cable systems arbitrarily and with impunity." Source: Comments of Spanish International Communications Corporation, Bahia De San Francisco Television Company and The Seven Hills Television Company, in MM Docket No. 85-349 at 10-11 (January 29, 1986); CR VOL. I,AA, EXH. 154, CR 15648-49.

526. The record also indicated that NCTA's Chairman had issued the following warning: "NCTA Chairman Allen: cable operators should 'hold their fire and wait for this to calm down' because action would be 'politically dangerous.' (Multichannel News, Sept. 23, 1985, at 6.)." Source: Comments of the National Association of Broadcasters in MM Docket No. 85-349 at 27 (Jan. 29, 1986); CR VOL. I.BB, EXH. 165, CR 16187.

527. The record included the following: "Moreover, this is only the first wave of effects; more can be expected in the future, and cable industry leaders have been urging a 'go slow' approach." Source: Joint Petition for Rule Making, filed by the National Association of Broadcasters, et al., in MM 85-349 at 10 (Oct. 4, 1985) (citing Address of NCTA Chairman Edward Allen to the Washington Cable Club, September 18, 1985 ('a wise man doesn't insult the alligators until he's across the river')); CR VOL. I.AA, EXH. 153, CR 15626.

528. The record also included the following information: "Cable industry leaders have publicly admonished cable operators to refrain temporarily from exercising the new leverage given them by the *Quincy* decision. Consequently, only the 'tip of the iceberg' of harm to broadcasters has surfaced to date." Source: Comments of Association of Independent Television Stations, Inc. in MM Docket No. 85-349 at vi (Jan. 29, 1986); CR VOL. I.BB, EXH. 162, CR 15829.

529. And the record indicated that: "It also appears that the cable industry itself has urged systems not to delete broadcast signals, at least until the conclusion of court and regulatory proceedings relating to this issue." Source: Comments of National Broadcast Company, Inc. in MM Docket No. 85-349 at 23 (Jan. 9, 1986); CR VOL. I.AA, EXH. 150, CR 15539.

530. Describing the political situation in 1988, one witness testified that:

> "There are drumbeats in the Congress. Hearings have been held on both sides of the Capitol, in two different subject matter jurisdictions, on problems in cable television. Six different pieces of legislation have been introduced in the House of Representatives to increase competition with cable television, ranging from channel shifting to TVROs to Must Carry (H.R. 1010, H.R. 1885, H.R. 2736, H.R. 2848, H.R. 3321, and H.R. 3624)."

Source: "Hearings on Cable Television" at 355 (Testimony of Jack Valenti); CR VOL. I.D, EXH. 9, CR 02441.

3. *Evidence That Uncertainty Relating To The Status Of The "Must Carry" Rules was Encouraging Some Operators To Maintain The Status Quo Until These Issues Were Resolved.*

531. The record indicated that: "NCTA General Counsel Brenda Fox: cable operators should 'wait and see what happens' and 'not act prematurely.'" Source:

Comments of the National Association of Broadcasters in MM Docket No. 85-349 at 27 (Jan. 29, 1986) (Citing CableVision, August 5, 1985, at 12.); CR VOL. I.BB, EXH. 165, CR 16187.

532. The record also indicated that: "Stephen Effros, President, Community Antenna Television Association: cable operators should take a 'go slow approach.'" (Communications Daily, Sept. 11, 1985, at 2). Source: Comments of the National Association of Broadcasters in MM Docket No. 85-349 at 27 (Jan. 29, 1986); CR VOL. I.BB, EXH. 165, CR 16187.

533. The following information was also in the record: "J.C. Sparkman, Vice President of Tele-Communications, Inc.: '[W]e're going to remain basically status quo *until this whole thing irons out.*' (Electronic Media, Sept. 9, 1985 at 35 (emphasis added)." Source: Comments of the National Association of Broadcasters in MM Docket No. 85-349 at 27 (Jan. 29, 1986); CR VOL. I.BB, EXH. 165, CR 16187.

Congress Could Reasonably Conclude That If Must Carry Requirements Were Defeated Again, The Cable Industry Could Justifiably Conclude That It Would Not Have To Fear Reimposition Of Must Carry Requirements in the Future

534. The following information was in the record: "I think the court of appeals has twice cautioned readers of its reports that it has not ruled that any must-carry rule is necessarily unconstitutional. On the other hand looking at this thing realistically, the cart has fallen off the bridge twice now. To mix my metaphors, I think this may be a little bit like baseball, three strikes and you are out. I would urge the Congress to be very careful about this, and I would urge my friends on the broadcasting industry who have their own internal pressures to be very careful about it too. If this thing goes down again as it has twice already, I think it perhaps may end

up so stigmatized in the judicial system that there will be a realistic opportunity to put it together again." Source: "Hearings on Cable Television Regulation (Part 2)" at 242-43 (Statement of James P. Mooney); CR VOL. I.I, EXH. 16, CR 06409-10.

VII. EVIDENCE THAT BROADCAST STATIONS DENIED CARRIAGE ON CABLE SYSTEMS, OR ADVERSELY REPOSITIONED, WERE IN JEOPARDY OF DETERIORATING SUBSTANTIALLY AND/OR FAILING ALTOGETHER.

A. Evidence That A Significant Segment Of The Broadcast Industry Was At Risk.

1. *Evidence That The Long-Term Prospects Of The Broadcasting Industry Were Both Uncertain And At Risk.*

535. The following information was in the record: "'As the decade draws to an end, broadcast television has seen its competitive universe turned upside down. Once apparently invulnerable, with steadily growing advertising revenues and growing audiences, broadcast television now sees simultaneously its advertising revenues and its audiences shrinking. Broadcast television faces a competitive force—cable television—that is enjoying steadily rising revenues, is spending more for programming and is attracting away broadcast viewers. The current calculus is at its historically most precarious for broadcasting. As broadcasting's revenue growth has slowed, so has its spending for programming. Hence, broadcasting's rivals for programming —basic cable and pay cable programming—both flush with rising advertising revenues and higher user fees, are bidding programming and thereby audiences away from broadcasting. Any further negative shocks to the broadcast advertising revenue stream would accelerate this process.' Likely, William III and

Rudolph Penner, *Impact of Advertising on the Competitive Structure of the Media: With a Special Analysis of Advertising of Automobiles, Beer, Wine Tobacco and Liquor*, at 14 (1990)

Source: "Hearings on Cable Television Regulation" at 862 n.3 (Statement of James B. Hedlund); CR VOL. I.J, EXH. 18, CR 07866.

536. The record indicated that: "The long-term outlook for free over-the-air broadcasting, I think would be quite bleak if the playing field isn't leveled because you have a migration of money to cable programmers, money coming really at the expense of free over-the-air broadcasting." Source: "Hearings on Cable Television Regulation" at 1005 (Statement of Laurence A. Tisch); CR VOL. I.J, EXH. 18, CR 08007.

537. The record also indicated that: "Furthermore, adverse effects on revenue due to lack of equal access only compound an ongoing revenue deterioration among local broadcast stations. The Commission staff has concluded that: 'The broadcast television industry has suffered an irreversible long-term decline in audience and revenue shares, which will continue through the current decade.'" Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 55 (Sept. 25, 1991) (citing OPP Working Paper, *supra*, at 159); CR VOL. I.K, EXH. 21, CR 08376.[2]

538. The record indicated that: "We stress finally that the one virtual certainty about the decade of the nineties is that the channel capacity of cable and other multi-channel media will greatly increase, the nonbroadcast program services distributed by such media will proliferate, and the audiences attracted to local broadcast stations will continue to decline. That development alone will drive some stations out of the business and put others

[2] As noted *supra*, the cited document is reprinted as F. Setzer & J. Levy, OPP Working Paper No. 26: "Broadcast Television in a Multichannel Marketplace," is reprinted in 6 FCC Record 3996 (June 27, 1991).

in dire straits." Source: Comments of Chris-Craft Industries, Inc. and MM Docket No. 90-4 at 18 n.38&39 (Sept. 25, 1991) (citing OPP Working Papers, *supra*, 6 FCC Rcd. at 4097-4098 (1991)); CR VOL. I.Q, EXH. 74, CR 11247.

539. The following information was also in the record: "Today, the local broadcast television industry, which has grown from 962 to more than 1,400 stations since the compulsory copyright license was enacted, increasingly is the compulsory copyright license was enacted, increasingly is threatened and disadvantaged. The decline of the networks' audiences has been the focus of extensive press coverage. Less has been said, however, about the local competitive balance. Locally, while many stations remain strong, generally the value of television stations has fallen; and in an almost unprecedented development, we now see cases of local television stations failing. This development is undoubtedly due to a number of forces, but the emergence of strong national cable television companies, with rights to serve as exclusive local providers of dozens of channels, is surely a significant factor, as is the power of cable television to attract both subscriber and advertising revenue." Source: FCC Report, "In the Matter of Competition, Rate Deregulations and the Commission's Policies Relating to the Provision of Cable Television Service," MM Docket No. 89-600, ¶ 153 at 80 (July 31, 1990); CR VOL. I.L, EXH. 23, CR 09052.

540. The record indicated that: "The trends local broadcasters are experiencing today are not expected to be reversed and the [OPP working paper's] outlook for broadcast television is gloomy: 'Broadcast television stations will experience declining revenues and increasing program costs. Network compensation will fall with network advertising revenues, and national spot advertising will erode partially to cable. The potential for greatly increasing competition from cable in local advertising is clear as well. Some marginal stations in large markets

will probably leave the market . . . . In smaller markets . . . a reduction in the number of stations may occur, which would reduce over-the-air choice." Source: Comments of National Broadcasting Company, Inc. on Second Further Notice of Proposed Rulemaking in MM Docket No. 90-4 at 10 (Sept. 25, 1991); CR VOL. I.Q, EXH. 75, CR 11260.

541. The following information was also in the record: "The [Office of Plans & Policy's] staff went on to note that: 'The industry's expectations concerning future profits are reflected in television station trading prices. The prices for which a station sells represents what buyers and sellers believe to be the present discounted value of the station's future profit stream. Television stations typically sold at prices between 10 and 12 times cash flow during the 1980s, but now are reported to be selling at seven to eight times cash flow. Clearly, beliefs concerning future profits of television stations have adjusted downward in the recent past.'" Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 57-58 (Sept. 25, 1991) (citing OPP Working Paper, *supra*, at 40); CR VOL. I.K, EXH. 21, CR 08378-79.

542. The record included the following information: "The staff also observed that ultimately: 'Broadcast television stations will experience declining revenues and increasing program costs. Network compensation will fall with network advertising revenues, and national spot advertising will erode partially to cable. The potential for greatly increased competition from cable in local advertising is clear as well.'" Source: Comments of the Association of Independent Television Stations, Inc. in MM Docket No. 90-4 at 42 n.76 (Sept. 25, 1991) (citing OPP Working Paper at 159); CR VOL. I.K, EXH. 21, CR 08363.

543. The record indicated that: "Recent survey evidence demonstrates the problem the networks face (see

Exhibit 5). Consumers increasingly value the unique aspects of cable programming that cannot be duplicated over-the-air. Consumers overwhelmingly favor a broad array of viewing choices and consider cable better than over-the-air broadcasting for entertainment, sports, cultural programs, educational programs and overall variety. With cable systems carrying the networks plus a highly valued variety of additional, popular programming in their basic tier, it is obvious that over the air cannot effectively compete with cable." Source: "Hearings on Cable TV Consumer Protection Act of 1989" at 81 (Statement of Gene Kimmelman); CR VOL. I.H, EXH. 14, CR 05014.

544. The record included the following report from the Federal Communications Commission:

> "Cable—no longer a fledgling, struggling industry—continued to enjoy the benefits of the compulsory license for its carriage of broadcast signals into the 1980s. The imbalance resulting from the growth of cable's advertising revenues and cablecast programming was, in our view, critically exacerbated by the loss of must carry rights by local broadcasters in 1985. With the compulsory copyright license and without must carry obligations, cable operators are able to engage in a type and degree of competition against local broadcasting that was unenvisioned and unintended when the Copyright Act was adopted. Cable operators carry the most popular local stations with virtually no compensation to the stations, use the audience they derive from carriage of these stations to increase their own advertising revenue and, in turn, buy more and better cable-exclusive programming, further draining audience and advertising revenues away from local stations. Indeed, some cable operators are now also beginning to compete directly with local television stations, creating channels that look very much like traditional broad-

cast television stations. *The strong localism and diversity in broadcast television service—positive forced that fifty years of regulatory policy under the Communications Act have sought to develop—will be jeopardized if this situation continues unaddressed."*

Source: FCC Report in MM Docket No. 89-600, FCC No. 90-276 at 78-79 (Released July 31, 1990) (emphasis added); CR VOL. I.L, EXH. 23, CR 09050-51.

545. The record indicated that: "Well, we know that ABC's network is gong to lose something like 70 million, and we know that CBS is going to break even or lose 40 million, so that's two networks losing money, and NBC might make 300 or 400 million. So you've got the three networks together and Fox network isn't making anything—Murdoch is going to lose money, too, with his startup. So you take the four people that are in the television networking business, and combined they're making less than 300 million. Even if NBC was making 400 million, CBS losing 40 and ABC losing 70 and Murdoch's gotta be losing 30 or 40, so combined they're making 300 million. Cable industry is making Five Billion!" Source: Must-Carry Briefing Paper by INTV, submitted in MM Docket No. 85-349 at 3 (March 10, 1987) (Speech by T.E. Turner); CR VOL. I.DD, EXH. 193, CR 17096.

546. The record also included: "It's almost to the point where I recommended years ago—at the time cable penetration was 30%. All we have to do, we've got the money now, is buy all the broadcasters—and values keep going down—buy 'em and just turn 'em off!" Source: Must-Carry Briefing Paper by INTV, submitted in MM Docket No. 85-349 at 4 (March 10, 1987) (Speech by T.E. Turner); CR VOL. I.DD, EXH. 193, CR 17097.

547. The record indicated that: "We've got a real opportunity now to just blow right by the over-the-air broadcasters. The real key to it is the broadcasters only have one source of revenue. We have two sources—

subscriptions and advertising. . . . You've got lots of channels to advertize on. The broadcasters only have one." Source: Must-Carry Briefing Paper by INTV, submitted in MM Docket No. 85-349 at 3 (March 10, 1987) (Speech by T.E. Turner); CR VOL. I.DD, EXH. 193, CR 17096.

548. The following information was in the record; "[T]he trend is for broadcasting to account for less of Hollywood's entertainment budget (from 18.5% in 1988 to 17.5% in 1993) while cable's expenditures continue to growth (from 27.9% in 1988 to 29% in 1993). *See* Veronis, Suhler & Associates, *Communication Industry Forecasts*, 1989-1993, p. 83. Cable's increasing strength will eventually allow it to dominate the programming market." Source: "Hearings on Cable Television Regulation" at 869 n.19 (Statement of James B. Hedlund); CR VOL. I.J, EXH. 18, CR 07873.

549. The following information was in the record: "Broadcasters are now in a cycle in which they will be continually outbid for programming. This in turn will lead to a decline in audience and subsequent loss of revenue. The emerging competitive calculus—one increasingly favorable to cable—has clear social implications. Put simply, as the cable audience grows and the broadcasting audience shrinks, the cable audience in relative terms becomes wealthier and the broadcasting audience poorer. This disparity is broadening as cable raises its user fees in order to cover its increased programming costs, resulting from bidding higher priced programming away from broadcasting. [Lilley and Penner, *supra*, n.3 at 14.] The downward spiral has already begun, as top quality programming is being siphoned off free off-air broadcasting." Source: "Hearings on Cable Television Regulation" at 889-90 (Statement of James B. Hedlund); CR VOL. I.J, EXH. 18, CR 07893-94.

550. The record indicated that: "The unfair economic advantage granted to cable by existing federal communi-

cations law, if allowed to continue through this decade, will inevitably result in the further strengthening of *paid* television services and the corresponding weakening of *free* TV. Cable's economic leverage will continue to allow it to move attractive programming from free to pay television. We are seeing this happen with premier sports events and we hear rumblings that the most popular sports events will next be moving onto pay-per-view at substantially higher fees to the consumer." Source: "Hearings on Cable Television Regulation" at 999 (Statement of Laurence A. Tisch); CR VOL. I.J, EXH. 18, CR 08001.

551. The record also indicated that: "While broadcast networks still get over half of cable television viewers, fifteen years ago, that number was over 98%. As cable invests in new, better, and more diverse programming, we expect this trend to continue." Source: "Hearings on Competitive Problems" at 168 (Statement of James P. Mooney); CR VOL. I.H, EXH. 14, CR 05101.

552. The following information was in the record: 'It is significant that broadcasters' audiences and advertising dollars are not disappearing—they are shifting to cable competitors. As the OPP Working Paper notes: 'Cable viewing appears to have displaced viewing of over-the-air signals to a considerable extent in recent years . . . [T]he declining share of broadcast viewing results both from increased cable penetration and from an increased share of cable programming in the viewing of cable households.' OPP found that the all day viewing shares of network affiliates in cable homes dropped from 73 share points in 1984/85 to 58 share points in 1989/90. In contrast, during this same period cable viewing rose from 24 to 39 share points." Source: Comments of National Broadcasting Company, Inc. on Second Further Notice of Proposed Rulemaking in MM Docket No. 90-4 at 9 (Sept. 25, 1991) (citing OPP Working Paper, at p. 23, Table 6); CR VOL. I.Q, EXH. 75, CR 11259.

553. The record indicated that: "Cable networks together deliver the same audience as a broadcast network and the trends for gaining more ground are clear." Source: Statement of FCC Chairman Alfred C. Sikes on the Commission's Cable Television Report at 2 (July 26, 1990); CR VOL. I.GG, EXH. 201, CR 18101.

554. The record indicated that: "The continuous decline of broadcast network audiences as cable has developed is a chilling testament to the reality of the downward spiral. Cable industry leaders in variably attempt to top one another in predicting where the network share bottoms out. TCI's John Malone recently predicted that the three networks' share would fall to 42% by the mid-nineties and to the mid 30's in cable households as cable achieved 70% penetration. Ted Turner opined, 'They may go off the charts completely.' " Source: Reply Comments of INTV in MM Docket No. 89-600 at 37-38 (April 2, 1990) (citing "Despite re-regulation Scare, Confidence Reigns, *Cable World*, December 18, 1989, at 6); CR VOL. I.X, EXH. 121 CR. 14458-59.

555. Congress was also aware of the following information: "When the FCC adopted its first effective competition standards, the three television networks (and their local affiliates) had close to 80 percent of the prime time market. Today, they have about 60 percent, and further decreases are likely. In a speech on May 7, 1990, Ted Turner, a major cable programmer, said that he believes the three networks will continue to lose market share and that the cable industry will soon match the networks in providing funding for original programming. Further evidence to support this conclusion can be seen, for example, in the Page 1 heading in the March 12, 1990 Multichannel News: 'Basic Viewing Passes B'Cast in Total TV Homes'. Thus, while over-the-air television may have been effectively competitive with cable in 1985, it has lost a significant amount of market power." Source: "1991 Senate Report" at 12; CR VOL. I.A, EXH. 3, CR 00272.

2. *Evidence of the Vulnerable Position of Many Local Broadcast Stations.*

556. The record indicated that: "The pre-tax profits for the median network affiliate and independent stations have declined since 1984. Small markets stations have been particularly hard hit. The median stations in markets 100-150 showed a pre-tax *loss* in 1989, while the median stations in these markets were profitable five years earlier." Source: Comments of the National Association of Broadcasters on the Further Notice of Proposed Rule Making in MM Docket No. 90-4 at 42 n.57 (Feb. 14, 1991) (citing *1990 NAB/BCFM Television Financial Report: 1985 NAB Television Financial Report*); CR VOL. I.O, EXH. 45, CR 10356.

557. The following information was in the record: "Independent UHF television stations constitute the most vulnerable class of over-the-air broadcast stations with respect to cable non-carriage or relocation. This is not only due to the reasons noted above (*i.e.* significant reduction in viewership and subsequent advertising revenues expected to result from noncarriage or unfavorable relocation), but also because many of these stations are only marginally profitable. During 1986, the average UHF independent station lost $1.4 million dollars; 25 percent of these stations lost more than $2.5 million dollars and 50 percent lost more than 1.2 million. According to one report, 20 independent television stations are currently under Chapter 11 protection." Source: "Hearings on Competitive Problems" at 332-333 (Statement of Edward O. Fritts); CR VOL. I.H, EXH. 14, CR 05265-66.

558. The record also included the following information: "[A]verage pre-tax profits for the Independents have declined over the period from 1985 through 1987. The average Independent now operates at a loss and our UHF members have experienced particular difficulty. At the present time, 23 Independent stations are in various stages

of bankruptcy proceedings." Source: "Hearings on Cable Television" at 528-29 (Statement of Preston Padden); CR VOL. I.D, EXH. 9, CR 02617-18.

559. The record indicated that: "[Independent] stations are also the newest and the most commercially vulnerable segment of the broadcasting industry. In 1988, according to a survey conducted by the National Association of Broadcasters, the average network affiliate station had pre-tax profits of $3.7 Million. By contrast, in 1988, the average Independent station suffered a pre-tax loss in excess of $400,000." Source: "Hearings on Must Carry" at 60-61 (Statement of Preston Padden); CR VOL. I.F, EXH. 12, CR 04070-71.

560. The record indicated that: "In 1990, the average independent UHF station had a loss equal to 7.2% of net revenue. [Citing NAB/BCFM Television Financial Report (1991) at 102]. Loss of access to their audiences, consequently, would have a devastating effect on the ability of these stations to remain in the video marketplace." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 56 (Sept. 25, 1991); CR VOL. I.K, EXH. 21, CR 08377.

561. The following information was included in the record: "Whereas independent television has grown in strength and numbers in the past decade, most independent stations still operate on tight margins. As financial data compiled by the National Association of Broadcasters reveals, independent stations in 1990 on average operated at a slight profit, 6.4% of net revenues. Outside the top 10 markets, at least 50% of independent stations had negative profit margins, and the average station operated at a loss. UHF independent stations have been and remain critically weak financially. Although Fox affiliations and lower program prices have resulted in improved performance in the last two years, the basic level of per-

formance is still poor." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 56 (Sept. 25, 1991); CR VOL. I.K, EXH. 21, CR 08377.

562. The record indicated that: "Independent television stations are least able to sustain declines in revenue resulting from loss of cable carriage. Whereas independent television has growth in strength and numbers in the past decade, independent stations operate on tight margins. As financial data compiled by the National Association of Broadcasters reveals, independent stations in 1988 generally operated at a loss. On average, in markets above the top 10 markets, independent stations had negative profit margins. In markets above the top 25 markets, independent stations on average had negative cash flow margins." Source: Reply Comments of INTV in MM Docket No. 89-600 at 22-24 (April 2, 1990); CR VOL. I.X, EXH. 121, CR 14443-45.

563. The record also indicated that: "The Commission staff has observed that: 'Losses of UHF independents averaged over 20 percent of net revenues from 1986 to 1988, falling to 13.7 percent in 1989.'" Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 56 (Sept. 25, 1991) (citing OPP Working Paper at 38); CR VOL. I.K, EXH. 21, CR 08377.

564. The record indicated that: "The staff even contemplates a reduction in the number of stations: 'Broadcasters' revenues fell over much of the late 1980s while programming costs increased, resulting in declining profits or increased losses for all classes of stations, with heavy losses concentrated among UHF independents and small-market stations. Independents appear to have had a reprieve in 1989. Unless the longer-term trend reverses, a shakeout could well occur.'" Source: Comments of the Association of Independent Television Stations, Inc. in

M.M. Docket No. 90-4 at 58 n.110 (Sept. 25, 1991) (citing OPP Working Paper at 46); CR VOL. I.K, EXH. 21, CR 08379.

565. The following information was in the record: "In part because of this audience loss, television stations have experienced flat to declining advertising revenues since the mid-1980's. Independent stations, many of which are UHF's and *highly dependent on cable carriage*, suffered revenue declines in 1986 and 1987, and an overall decline of almost 2% from 1985 through 1989. Cable operator advertising revenues, on the other hand, have increased almost four-fold since 1985, and are expected to more than double again in the next five years." Source: Comments of National Broadcasting Company, Inc. on Second Further Notice of Proposed Rulemaking in MM Docket No. 90-4 at 9-10 (Sept. 25, 1991) (citing OPP Working Paper, at 72-73, Table 16); CR VOL. I.Q, EXH. 75, CR 11259-60.

566. The record indicated that: "In the markets below the top ten, more than half of all independent stations are already experiencing losses, at least on paper. Here, a reduction in the number of stations may occur . . ." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 62 (Sept. 25, 1991) (citing OPP Working Paper at 160); CR VOL. I.K, EXH. 21, CR 08383.

567. The following information was in the record: "Even independent stations in large markets were not uniformly profitable: 'Not all stations in large markets shared the high profits, however. At least 25% of stations in the top ten markets experienced losses. In the current market, many stations experiencing losses may be new entrants or UHF independents that may have been profitable when there were fewer competing channels.'" Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 56-

57 (Sept. 25, 1991) (citing OPP Working Paper at 35); CR VOL. I.K, EXH. 21, CR 08377-78.

568. The record indicated that: "More specifically with respect to the actual revenue (as opposed to share of revenue) performance of local television broadcast stations, the staff obeserved: 'Because the number of stations has increased, the growth rate of advertising revenues per station has been lower than that of aggregate station advertising revenues. Dividing station advertising revenues in table 25 by the number of commercial stations shows that advertising revenues per station in fact have fallen in the neighborhood of 4 per cent per year in real terms from 1987 on. The downward trend clearly began well before the current recession, so it is not a cyclical phenomenon.'" Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 55 (Sept. 25, 1991) (citing OPP Working Paper at 128); CR VOL. I.K, EXH. 21, CR 08376.

569. The record also indicated that "a recently published study" had "noted that viewership of broadcast stations was declining, especially for stations not viewed on cable systems, and more and more marginal, particularly UHF television stations, could expect to go silent in the coming years." Source: Reply Comments of the Trinity Broadcasting Network in MM Docket No. 90-4 at 7 (Oct. 25, 1991) (citing OPP Working Paper); CR VOL. I.Q, EXH. 77, CR 11278.

570. The following information was included in the record: "Television stations are increasingly facing more competition both in attracting viewers and also in selling advertising. More stations are on the air along with the increased number of cable signals (both cable networks and imported distant broadcast signals). This has put a severe financial strain on many stations. Besides the stations already mentioned as under bankruptcy protection, many more stations are losing considerable amounts of

of money. From the most recent data available, the average independent lost $69 thousand in 1986. This actually understates the position for the 'typical' station. The median value for pre-tax profits for all independent stations responding was a loss of $995 thousand. This large disparity between the average and the median is generated by the stronger financial health of larget market independents. Figure 1 shows the average independent station pre-tax profits (or losses) for different ADI market sizes. Note that in all market size groupings except the largest, the average station lost money, in one case nearly $2 million." Source: Comments of the National Association of Broadcasters, Appendix Volume, in MM Docket No. 88-138 at 2 (July 8, 1988); CR VOL. I.Y, EXH. 128, CR 14983.

571. The following information from the Cable Advertising Bureau was also in the record:

> "The fact is that independents have not benefitted from network audience erosion. They, too, have suffered losses. When superstation audiences are shown separately, it is clear that superstation and satellite networks are the fastest growing program services. The misperception about independent growth stems from the practice of lumping superstations with [independent stations] . . . . On the whole, independent audiences have declined slightly in the past year. Declines are evident in their strongest dayparts—early fringe, weekend, and prime time."

Source: Cable Advertising Bureau, "Independent Television Stations—Perception and Fact," included in MM Docket No. 85-349 (Bate Stamp 5971); CR VOL. I.CC, EXH. 174, CR 16550-51.

572. The record also included information showing the "share of total U.S. viewing by independent stations (not including superstations) as follows:

1984:	14.7
1985:	14.7
1986:	15.1
1987:	15.3
1988:	15.7
1989:	14.7
1990:	15.1

Source: "Hearings on Cable TV Consumer Protection Act of 1991" at 179 (Statement of R.E. "Ted" Turner); CR VOL. I.I, EXH. 17 CR 06643.

573. The record indicated that: "Independent UHF television stations constitute the most vulnerable class of over-the-air broadcast stations with respect to cable noncarriage or relocation. This is not only due to the reasons noted above (*i.e.*, significant reduction in viewership and subsequently advertising revenues expected to result from noncarriage or unfavorable relocation), but also because many of these stations are only marginally profitable. During 1986, the average UHF independent station lost $1.4 million dollars; 25 percent of these stations lost more than $2.5 million dollars and 50 percent lost more than $1.2 million. According to one report, 20 independent television stations are currently under Chapter 11 protection." Source: "Hearings on Competitive Problems" at 332-33 (Statement of Edward O. Fritts) (citing "Pop Goes the Stations", *Channels*, Jan. 1988, at 73); CR VOL. I.H, EXH. 14, CR 05265-66.

574. The record indicated that: "In the earlier paper, we suggested that non-carriage could have a perilous impact on certain broadcasters who were at that time facing severe financial difficulties. This too has only increased in its likelihood. Many stations, especially independent stations, are losing considerable amounts of money. In fact, in 1987, 20 independent stations were under Chapter 11 bankruptcy protection." Source: Comments of the National Association of Broadcasters, Appendix Volume,

in MM Docket No. 88-138 at 1 (July 8, 1988); CR VOL. I.Y, EXH. 128, CR 14982.

575. The record also included the following information:

> "My office has recently completed a study of the financial health of independent UHF television stations, based upon a 1984 NAB financial survey of revenue and expense data (reported for the year 1983). Survey data was provided by 471 responding television stations (independents and network affiliates). I will state below some of the principal findings of this study insofar as independent television stations are concerned.
>
> From the most recent financial report, one can see clearly the precarious position of many responding UHF stations. A greater percentage of UHF independent respondents lost money in 1983 than other station types. Of sixty UHF independent stations responding to the 1984 NAB financial surveys, twenty-three (38.33%) lost money. This number is much higher than the 14.38% (58 of 377) of all responding network affiliated stations that lost money.
>
> When stations from smaller markets are considered separately, the percentage of unprofitable UHF independents increases. In market sizes of ADI 11-125, 44.68% of responding UHF independents (21 of 47 stations) lost money in 1983. The amount of these losses was not trivial, with some UHF independents in these markets losing over $800 thousand.
>
> Comparison of recent profit performances of different station types in market sizes ADI 1-10 also demonstrates that UHF independent stations have lost ground to other stations. In those markets the median profits for responding UHF independent stations were 19.59% of the median profits for all re-

sponding affiliated stations in 1979; in 1983, however, the reported median UHF station earned 12.81% of the median profits earned by affiliated stations. This reduction in the profits earned indicates that UHF independent stations have not enjoyed the growth that network affiliated stations have realized.

Many previous studies have provided similar evidence regarding the difficult financial position of UHF stations relative to other station types one such study conducted in 1982 by Brown, Bortz and Coddington (BBC) on *The Economics of Television Station Operation in 100-Plus Markets* found similar results. In a regression analysis of stations' audiences, revenues and profits, BBC obtained statistically significant estimates of the relative positions of UHF stations in these smaller sized markets. They found that a UHF station in a market with two VHF stations will have 25.8% smaller audience, generally 17.4% less advertising revenues, and earn 69.7% less in profits than the VHF stations.

The FCC's Network Inquiry staff also conducted a study on this issue which produced similar results. That analysis found that UHF stations are 'significantly less profitable than VHF stations, other things equal.' (Network Inquiry Special Staff, 'The Determinants of Television station Profitability,' Preliminary Report, June 1980, Chapter IV, p. 97)."

Source: Comments of the National Association of Broadcasters, Appendix Volume, in MM Docket No. 88-138 at 1-3 (July 8, 1988) (Affidavit of Mark R. Fratrik); CR VOL. I.Y, EXH. 128, CR 14758-60.

576. The record indicated that: "At this time of marginal operation, which transcends the current economic downturn and recessionary economy, independent stations, therefore, are extraordinarly vulnerable to additional revenue reductions resulting from lack or loss of access to cable homes in their service areas or from disadvantageous channel repositioning." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 58 (Sept. 25, 1991); CR VOL. I.K, EXH. 21, CR 08379.

3. *Evidence That Growth In The Number Of Broadcast Stations Had Stalled And Would Decline In The Future.*

577. The record included the following information about the historical growth in the number of independent broadcast television stations:

1970-79:	(1-12 stations per year)
1980:	13
1981:	31
1982:	34
1983:	27
1984:	30
1985:	38
1986:	44
1987:	27
1988:	33
1989:	23
1990:	13
1991:	9

Source: Reply Comments of the Association of Independent Television Stations, Inc. in MM Docket No. 90-4 at 1 (Oct. 25, 1991) (Exhibit E); CR VOL. I.S, EXH. 81, CR 11440.

578. The record indicated that: "The number of vacant channels is likely to rise if stations' revenue potential is subject to reduction. Again, between June 30, 1989, and June 30, 1991, the number of vacant UHF channels increased from 157 to 198. [Citing Public Notice, 'Television Channel Utilization' (September 7,

1989); Public Notice, 'Television Channel Utilization' (August 30, 1991)]. Between June 30, 1989 and June 30, 1991, two more VHF channels also have become vacant. [Citing Id.] Among the vacant UHF channels, 46 are in the top 50 markets. [Citing Id.]" Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 64 (Sept. 25, 1991); CR VOL. I.K, EXH. 21, CR 08385.

579. The record also indicated that: "The rate of growth of broadcast television has cratered since the ultimate demise of the Commission's must carry rules. Exhibit E shows the decline in the number of new stations' commencing operation since 1986 among independent stations, UHF stations, and UHF independent stations. For example, from a peak of 44 in 1986, the number of new independent stations decreased to 13 in 1990. Only nine have commenced operation in 1991. Similarly, from a peak of 43 in 1986, the number of new UHF independent stations decreased to 11 in 1990. Only nine have commenced operation in 1991. From a peak of 44 in 1986, the number of new UHF stations decreased to 13 in 1990. Only 11 have commenced operation in 1991." Source: Reply Comments of the Association of Independent Television Stations, Inc. in MM Docket No. 90-4 at 20 (Oct. 25, 1991); CR VOL. I.Q, EXH. 81, CR 11378.

580. The record indicated that: "The lack of carriage requirements also has blunted growth of broadcast television. The number of new stations going on the air has declined precipitously in the past three years. Again thirteen permittees began operation, but went dark before they were fully licensed." Source: Reply Comments of the Association of Independent Television Stations, Inc. in MM Docket No. 90-4 at 19 (Oct. 25, 1991); CR VOL. I.Q, EXH. 81, CR 11377.

581. The following information was included in the record: "The truth is, the growth of new stations has been brought to an absolute halt. You cannot sign a new

station on today, because you cannot get on the cable, and it is not that the stations would not be viable in the absence of cable. The problem is they are signing on in an environment where all the other stations are on the cable and in that environment you cannot come into the marketplace and start a new station if you are not on the cable." Source: "Hearings on Must Carry" at 57-58 (Statement of Preston Padden); CR VOL. I.F, EXH. 12, CR 04067-68.

582. There was also evidence in the record indicating that most markets had only a limited number of commercial independent broadcast stations. Source: INTV, "Independent Markets," Attachment A to Comments of INTV in MM Dock. No. 89-600 (March 1, 1990); CR VOL. I.U, EXH. 107, CR 12689.

583. There was also substantial evidence on which Congress could reasonably conclude that the historical growth of stations had not only stalled, but that it would be reversed in the future. *See* Section VII.A.1 *supra*. For example:

> "The trends local broadcasters are experiencing today are not expected to be reversed and the [OPP working paper's] outlook for broadcast television is gloomy: 'Broadcast television stations will experience declining revenues and increasing program costs. Network compensation will fall with network advertising revenues, and national spot advertising will erode partially to cable. The potential for greatly increased competition from cable in local advertising is clear as well. Some marginal stations in large markets will probably leave the market. . . . In smaller markets . . . a reduction in the number of stations may occur, which would reduce over-the-air choice."

Source: Comments of National Broadcasting Company, Inc. on Second Further Notice of Proposed Rulemaking

in MM Docket No. 90-4 at 10 (Sept. 25, 1991); CR VOL. I.Q, EXH. 75, CR 11260.

584. FCC Commissioner Quello testified before Congress that: "[b]ecause the lack of carriage adversely affects the economic viability of local broadcast stations, the number of off-air signals available in a community may be reduced significantly in the near future." Source: "Hearings on Cable Television" at 301 (Statement of James H. Quello); CR VOL. I.D, EXH. 9, CR 02387.

Congress Could Reasonably Conclude That to the Extent Cable Carriage Had Contributed to the Historical Growth of UHF and Independent Stations While the Must Carry Requirements Had Been in Effect. If These Stations Were Now Dropped From Cable Systems This Historical Growth Pattern Could be Reversed

585. The following information was included in the record: "As has been stated repeatedly (but most recently in the OPP Working Paper), the availability of many television broadcast signals to viewers, particularly UHF signals, is largely the result of cable carriage. Logic therefore dictates that without carriage, many stations' access to viewers and viewers' access to many over-the-air stations would be diminished. Even with substantial cable carriage, television broadcast stations have suffered eroding audiences and slow-growing to flat advertising revenues. Attracting the audiences upon which sales to advertisers are based is becoming increasingly difficult as competition and viewer choice increase. Local stations also face increased competition for advertising dollars from local cable systems and barter syndicators. These competitive challenges will become insurmountable if cable has and exercises the ability literally to cut off television stations' access to their local audience." Source: Comments of National Broadcasting Company, Inc. on Second Further

Notice of Proposed Rulemaking in MM Docket No. 90-4 at 8-9 (Sept. 25, 1991); CR VOL. I.Q, EXH. 75, CR 11258-59.

586. T.E. Turner, the President and CEO of Turner Broadcasting Corporation testified that: "a lot of independent stations that [the INTV] represents . . . would not have been viable without cable carriage." Source: "Hearings on Cable Television" at 455 (Testimony of R.E. "Ted" Turner); CR VOL. I.D, EXH. 9, CR 02544.

587. The record included the following: "The Commission hardly can escape the implication of its staff study *vis-a-vis* carriage of local broadcast signals. The staff has concluded that 'Expansion of over-the-air signals was made possible by cable.' [OPP Working Paper at 161]. Stations which have been born and lived by carriage will wither and die without carriage. . . . Very simply, if stations are denied access to audience while suffering audience fragmentation, then the level of broadcast service—both quantitatively and qualitatively—will decline more precipitously." Source: Comments of INTV in MM Docket No. 90-4 at 108-09 (Sept. 25, 1991); CR VOL. I.Q, EXH. 73, CR 11172.

588. NCTA also indicated that: "[t]he proliferation of independent broadcast stations is, of course, directly attributable to cable carriage—not to non-carriage. As the OPP Report confirms, '[e]xpansion of over-the-air signals was made possible by cable (but claiming that if audience fragmentation is reducing revenues and quality of this programming, noncarriage of stations that existed only because of cable will enhance broadcasting).'" Source: Reply Comments of NCTA in MM Docket No. 90-4 at 5 (Oct. 25, 1991); CR VOL. I.Q, EXH. 78, CR 11299.

B. Evidence that broadcast stations denied access to cable systems or adversely repositioned would be significantly impaired.

1. *Evidence that broadcast station revenue depended on access to audiences, and that as cable penetration rates continued to grow, broadcast stations denied access to cable homes would become decreasingly viable.*

Broadcast Station Revenues are Determined by Audience Size

589. The record indicated that: "It is important to realize, however, that a cable system's refusal to carry a particular station affects not only what the system's subscribers view, but also it indirectly affects what will be viewed by non-subscribers. Simply put, a television station's audience size directly translates into revenue—larger audiences attract larger revenues, through the sale of advertising time. If a station is not carried on cable, and thereby loses a substantial portion of its audience, it will lose revenue. With less revenue, the station can not serve its community as well. The station will have less money to invest in equipment and programming. The attractiveness of its programming will lessen, as will its audience. Revenues will continue to decline, and the downward spiral will continue." Source: "Hearings on Must Carry" at 40 (Statment of Preston Padden); CR VOL. I.F, EXH. 12, CR 04050.

590. The record indicated that: "Broadcast television stations have a single stream of revenue—advertising sales. The single most significant factor in the amount a television station can charge for advertising on the station is the size of its audience." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 53-54 (Sept. 25, 1991); CR VOL. I.K, EXH. 21, CR 08374-75.

591. The record also included information regarding a study by Dr. Franklin M. Fisher, an Associate Professor of Economics at M.I.T. at the time of the study: 'In an effort to demonstrate the economic adverse impact on local stations the broadcasters submitted a report by Dr. Franklin M. Fisher, Associate Professor of Economics at M.I.T. The Fisher Report concluded that there was *a direct correlation to size in audience and station revenues . . .*" Source: Joint Comments of Howard University, The National Association of Black-Owned Broadcasters, The National Bar Association nad the National Conference of Black Lawyers Communications Task Force, in MM Docket No. 85-349 at 6-7 n.1 (Jan. 29, 1986) (quoting J.C. Smith, Primer on the Regulatory Development of CATV (1950-72) (emphasis added), 18 *Howard L.J.* 729, 737 (1975)); CR VOL. I.AA, EXH. 161, CR 15804.

592. The following information was in the record: "A decrease in a television station's audience, therefore, produces a like decrease in revenue. In the case of a new station, the inability to increase audience caps the revenue the station can generate through sale of advertising time." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 (Sept. 25, 1991) at 54; CR VOL. I.K, EXH. 21, CR 08375.

593. The record indicated that: "A drop of even a single rating point may represent a loss of ⅓ to ½ of a broadcaster's potential audience. Audience diversion translates directly into lost revenue for local broadcasters." Source: Reply Comments of INTV in MM Docket No. 90-4 at 18 n.32 (March 1, 1991); CR VOL. I.O, EXH. 49, CR 10469.

594. The record indicated that: "The Commission, itself, has recognized what the effect of such a dilemma is on a broadcast station, 'As the audience a station can deliver decreases, advertisers will demand lower prices per unit of air time, and station revenues and profits will decline. Decreased revenues and profits will cause

the local station to reduce its program efforts and thereby to reduce its service to the public.'" Source: Comments of Group H Broadcasting Corp. in MM Docket No. 88-138 at 9-10 (July 8, 1988) (citing FCC *Report and Order*, 1 F.C.C. Rcd. at 865); CR VOL. I.Z, EXH. 133, CR 15234-35.

595. The following information was in the record: "As stated by the court in *United Video v. FCC*, 890 F.2d 1173, 1179 (D.C. Cir. 1989) . . .: 'The Commission reasonably inferred that diversion lessened the value of programming by lowering advertising revenue. The petitioners contest this finding, claiming it is based on a single study, which they attack as faulty. However, the report makes it clear that the Commission relied on the study for only a rough approximation of the decrease in advertising revenue. *More important was the hardly controversial conclusion that the amount advertisers will pay depends on the size of the audience that a program attracts. This statement needs no detailed study to support it.*'" Source: Comments of the Association of Independent Television Stations, Inc. in MM Docket No. 89-600 at 53 (March 1, 1990) (emphasis in original); CR VOL. I.U, EXH. 107, CR 12619.

596. The record indicated that: "However, detailed studies have confirmed that station audience and station revenue are directly related to a near one-to-one relationship. *Economic Relationship Between TV Broadcasting and Cable TV*, 71 FCC 2d 632, 713, n.155 (1979)." Source: Comments of the Association of Independent Television Stations, Inc. in MM Docket No. 89-600 at 53 (March 1, 1990); CR VOL. I.U, EXH. 107, CR 12619.

As Cable Penetration Grew, Broadcast Stations Were Dependent on Cable Carriage for Their Long Term Viability

597. The record indicated that: "When the station went on the air in 1980, about 30% of the homes in the Tulsa

market were cable subscribers. With that percentage of cable subscribers, it was obvious to Tulsa 23 management that cable would grow and that KOKI-TV could not be economically viable without carriage on cable systems. The fact is that the station would never have been built had it been known at the time that cable systems might not be obligated to carry local television stations." Source: Comments of the National Association of Broadcasters, Appendix Volume, in MM Docket No. 88-138 at 1-2 (July 8, 1988) (Affidavit of David U. Lavenstein); CR VOL. I.Y, EXH. 128, CR 14686-87.

598. The following information was in the record: "As FCC Chairman Sikes correctly noted at the Commission's Orlando and St. Louis cable TV field hearings earlier this year, since the enactment of the Cable Act, cable television has become the principal delivery medium for video programming and experience has shown that few cable subscribers retain the ability to receive television stations over the air. Therefore, a television station that is not carried by cable systems in its market is doomed. Lack of carriage impairs the station's ability to produce programs addressing the needs and interests of its community of license. For UHF stations on the upper channels and for the holders of the more than 200 outstanding television construction permits, cable carriage or the lack of cable carriage, may well determine whether or not the station is built, and if built, whether it can survive. The issue is preserving local broadcasting and not simply local broadcasters." Source: "Hearings on Cable Television Regulation (Part 2)" at 226 (Lowell W. Paxson); CR VOL. I.I, EXH. 16, CR 06393.

599. The record included the following information: "Cable systems sell advertising at the local level and compete with local broadcasters for advertising revenue. A broadcaster's sole source of income is through the sale of advertising time. By refusing to carry a broadcast

station, cable can effectively cut off a station from 60% (national cable penetration average, however, in some markets it is as high as 85%) of the viewing audience thereby severely reducting its ability to generate income. Broadcasters cannot survive on 40% of the viewing audience that continues to shrink as cable penetration increases." Source: Comments of KTFH TV, Conroe, Texas, in MM Docket No. 90-4 at 9 (Sept. 25, 1991); CR VOL. I.P, EXH. 62, CR 10778.

600. The following information was in the record: "While we see a loss of 60% of households in our viewing area, we are blocked from virtually all homes in Muskegon, Michigan, our city of license, due to the actions of the cable operator. Although we take our responsibility to meet the needs and interests of our city of license very seriously, these efforts cannot even reach those that they are intended to benefit because they are denied access to this service by the cable operator. Few stations nationwide could survive with 60% of their local carriage area blocked by a cable company's monopolistic action. *Over-the-air broadcasters must have access to the viewers within their local broadcast areas if they are to survive.* The over-the-air broadcasting industry as a whole will undoubtedly be in jeopardy if there is not an unconditional protection provided, as 'must carry' is, to insure access to the audience which a station is license and committed to serving." Source: Comments of Richard L. Woodby, General Manager, WTLJ TV, Muskegon, MI, in MM Docket No. 90-4 at 4-5 (Sept. 13, 1991); CR VOL. I.P, EXH. 57, CR 10711-12.

601. The record indicated that: "Denying a local station access to the cable system has a serious potential impact on the local station's audience, an impact which grows proportionately with the level of cable penetration in its area." Source: Reply Comments of the National Association of Broadcasters, Appendices, in MM Docket

No. 89-600 at 1 (April 2, 1990); CR VOL. I.X, EXH. 119, CR 14222.

602. The record also indicated that: "Blackstar's Melbourne, Florida station, WBSF, serves an estimated 820,000 households, 520,000 of which subscribe to cable. Cable penetration in the Orlando market is approaching 70% which means that if WBSF is not carried on cable, it effectively is not going to be seen." Source: "Hearings on Cable TV Consumer Protection Act of 1991" at 428 (Statement of Roy M. Speer); CR VOL. I.I, EXH. 17, CR 06886.

603. The record indicated that: "The exclusion of broadcast stations from cable systems will limit their access to home viewers, thus threatening their continued economic survival and the supply of important local programming to consumers." Source: "Hearings on Cable Television Regulation (Part I)" at 337 (Testimony of Charles A. DeVaney); CR VOL. I.G, EXH. 13, CR 04534.

604. The following information was in the record: "For all local TV stations, must carry is essential if they are to compete on the same playing field as cable delivered programming, whether it's a cable network or another local TV station. But the problem is particularly acute for local TV stations that happen to be the last in the market and have a high UHF channel. These are the local broadcast stations truly at risk without must carry. In an era in which cable is the dominant video distribution medium, and carriage it totally at the whim of the cable operator, a local station does not have the opportunity to compete for audience if it is not carried by cable." Source: "Hearings on Cable TV Consumer Protection Act of 1991" at 429 (Statement of Roy M. Speer); CR VOL. I.I, EXH. 17, CR 06887.

605. The record indicated that: "Cable too often sits in a position where it can throttle or severely hobble its

competitors. If you cannot reach an audience effectively, you cannot survive as a broadcaster. If cable operators can impose economically backbreaking conditions on carriage, broadcasters will be unable to be economically competitive." Source: "Hearings on Must Carry" at 142 (Statement of Daniel L. Jaffe); CR VOL. I.F, EXH. 12, CR 04152.

606. The following information was in the record: "Because of the historic underdevelopment of television in New Jersey and the difficulty in receiving signals of distant network stations, cable penetration is high. Without cable carriage, prospects for Station WWAC-TV as a broadcast station are bleak. Without cable carriage, it will obviously be extraordinarily difficult for Station WWAC-TV to develop an audience." Source: Comments of Pennsylvania Pay Television, Inc. in MM Docket No. 85-349 at 2 (Jan. 29, 1986); CR VOL. I.AA, EXH. 160, CR 15794.

607. The record also included the following information:

> "KTIE-TV, Oxnard, California, a UHF independent which is Ventura County's first and only local television outlet, has responded to the needs of its local audience with, among other things, a 15-person local news department, two half-hours of live local news programs daily, a live electronic news-gathering (ENG) unit, two weekly local public affairs programs, and a live local children's science and entertainment show (with local children in the studio audience) daily. Due to mountainous terrain, 72.5% of Ventura County's television households subscribe to cable. Two cable systems in KTIE's viewing area, accounting for almost 30% of the total households in its market, have refused to carry KTIE, notwithstanding the local public's apparent wishes, as reflected in a local newspaper editorial (*see* Attachment F hereto). Two other local cable systems carry KTIE only on premium tiers. As one local cable operator stated with reference to KTIE, 'Without cable's cooperation, they won't survive.' "

Source: Comments of Association of Independent Television Stations, Inc. in MM Docket No. 85-349 at 64-65 (Jan. 29, 1986) (citing *Cable TV Franchising*, Dec. 23, 1985 at 3); CR VOL. I.BB, EXH. 162, CR 15892-93.

608. The record included the following: "For each individual broadcast station, the ability to reach 55% of its potential audience is absolutely essential if the is to survive. If the station cannot even reach that proportion of the audience, it cannot sell advertising at compensatory rates. Without the sale of advertising at compensatory rates a broadcast station has no, or insufficient, income and cannot survive." Source: Further Comments of KTGM-TV in MM Docket No. 90-4 at 11-12 (Sept. 25, 1991); CR VOL. I.P, EXH. 67, CR 10898-99.

609. The record indicated that: "Over-the-air stations are caught between a rock and a hard place. With limited channel capacity, they cannot compete with the specialized and diverse programming cable can offer. Yet as cable becomes more pervasive, the over-the-air networks need to be part of the basic package to preserve their audience. However, once they are on the cable, they are at the mercy of the operators for channel location. They can be easily disadvantaged by bad location. Local stations can be put out of business by a refusal to carry . . ." Source: "Hearings on Cable TV Consumer Protection Act of 1989" at 79-81; CR VOL. I.H, EXH. 14, CR 05012-14.

610. The record included the following: "Cable systems are a bottleneck through which television stations increasingly must pass to reach their intended audience, and indirectly, to sell time to advertisers. Estimates of national cable penetration now range between 52% and

55% of all television households. Many of those households connected to cable television systems do not know how to shift their receivers from the cable systems to over-the-air signals. The difficulty of switching between cable reception and quality reception of over-the-air signals inhibits almost all of the remaining households from making such shifts except in extraordinary circumstances. Thus it is now probably true that on a nationally averaged basis, a television station cannot reach about half its intended audience if it is not carried on cable television systems in its viewing area. Clearly, a television station could not survive long in those circumstances." Source: Comments of Guahan Airways, Inc. in MM Docket No. 90-4 at 3-4 (Feb. 14, 1991); CR VOL. I.O, EXH. 42, CR 10098-99.

611. The following information was in the record: "The competitive bottleneck is particularly severe in Guam. Approximately 90% of Guam's television households receive their signals through the Guam cable system. This situpation has prevailed for so long that many citizens of Guam are hardly even aware of the possibility of receiving television signals over-the-air. Very few Guam citizens know how to switch between cable television and receipt of over-the-air signals. Very few Guam homes have rooftop antennas necessary to receive quality broadcast signals. Many of the rabbit ear antennas on other televisions have been disconnected or removed. In these circumstances, a broadcast television station is clearly dependent on cable carriage for its survival." Source: Comments of Guahan Airwaves, Inc. in MM Docket No. 90-4 at 4 (Feb. 14, 1991); CR VOL. I.O, EXH. 42, CR 10099.

612. The following information was also in the record: "In 1988, Storer Cable decided to reposition WTOG, Channel 44, St. Petersburg, from Channel 9 to Channel 25 on the cable system. Storer initiated the repositioning

so they could carry distant signal WGN, Channel 9, Chicago, on channel. With the repositioning of WTOG to channel 25, WTOG lost audience share within the Sarasota ADI. As a result of WTOG's loss of audience share, Arbitron abolished the Sarasota ADI and placed WWSB, the only Sarasota television station, within the larger Tampa-St. Petersburg ADI. Due to the loss of the Sarasota ADI—WWSB no longer receives the critical ratings and product usage information regarding the Sarasota market, but must rely on the diluted rating information of the much larger Tampa/St. Petersburg market. The loss of such market specific information has seriously hampered WWSB marketing efforts and adversely affected advertising revenues. Therefore, as a result of Storer Cable's decision to reposition one station in favor of a distant signal, WWSB, the only local Sarasota television station, was denied its local market designation and forced to compete in the larger Tampa-St. Petersburg market." Source: Statement of Douglas C. Barker, President, Southern Broadcast Corp. of Sarasota, Before the FCC, Orlando, FL, included in record in MM Docket No. 89-600 at 4-5 (March 2, 1990); CR VOL. I.R, EXH. 83, CR 11478-79.

613. The record indicated that: "Eliminating competitors from the market is not necessarily anti-competitive. However, the pricing and monopoly studies reviewed previously strongly indicate that in the absence of these extra broadcast signals price competition will in fact be lessened. *Were such broadcast signals to be excluded from the largely urban markets where they do appear to restrain basic cable rates, the operating margins are likely so thin that these firms would not survive.*" Signal access rules would likely preserve competitors, but the record indicates they would also preserve and enhance competition." Source: Dr. James A. Clifton, Principal Consultant, Nathan Associates, Inc., "Must Carry and Effective Competition in the Emerging Video Mar-

ketplace: A Re-examination of the Evidence" (Oct. 25, 1991), submitted on behalf of INTV in MM Docket 90-4 at 23 (October 25, 1991); CR VOL. I.GG, EXH. 203, CR 18145.

614. The record indicated that: "Carriage of new local signals in highly cabled markets is vital to the stations' ability to raise the revenues necessary to survive . . ." Source: Comments of Telepictures Corp. on Notice of Inquiry and Notice of Proposed Rulemaking, in MM Docket 85-349 at 4 (Jan. 29, 1986); CR VOL. I.GG, EXH. 208, CR 18273.

615. The record included the following information: "If, as a consequence of the Court's decision in the *Quincy* case, the must-carry rules were to cease to exist, and if KMIR were to be dropped altogether by the Palm Springs ADI cable systems in favor of carrying KNBC only, when there is no question, given the degree of cable penetration in the Palm Springs ADI, that KMIR's audience losses would vastly exceed those reported above, and would approximate the percentage of cable penetration in the ADI. In that event, our station, which barely survives even with its present level of viewership, would without doubt be forced to discontinue operations." Source: Comments of the National Association of Broadcasters, Appendix Volume, in MM Docket No. 88-138 at 3 (July 8, 1988) (Affidavit of John Conte); CR VOL. I.Y, EXH. 128, CR 14695.

616. The record indicated that: "*WYED-TV, Goldsboro, North Carolina*—a new station, which reports that failure to obtain carriage on virtually all local cable systems has 'made it practically impossible to attract advertisers to sponsor its local programs,' and has resulted in its having 'little bargaining power with the syndicators' to purchase other programming. WYED states that it 'faces a strong likelihood of failure if access to cable systems is denied.'" Source: Reply Comments of the National Association of Broadcasters, Appendices, in MM

Docket No. 89-600 at 7 (April 2, 1990); CR VOL. I.X, EXH. 119, CR 14356.

617. The following information was included in the record: "*Must carry* is vital to the survival of local television stations because, as Chairman Sikes said at the FCC's March 2 field hearing in Orlando, Florida, cable has become the 'principal reception medium' for television. This means that unless a station has access to cable in its service area, it simply cannot compete with cable-delivered programming to all households within the viewing area. For the holder of a newly issued television construction permit, cable carriage or the lack of cable carriage, may well determine whether or not the station is built and, if built, whether it can survive." Source: Comments of Steven C. Roberts, President and General Manager of WHSL-TV, St. Louis, Missouri at Cable TV Field Hearing, at 1 (March 15, 1990), included in MM Docket No. 89-600; CR VOL. I.W, EXH. 117, CR 13724.

618. The record indicated that: "By refusing to carry KCRG-TV's network programming on the Dubuque cable system, TCI deprived the station of important advertising revenues that it would have otherwise received. Almost half (43%) of the availabilities that KCRG-TV sells locally to spot advertisers, amounting to 1 hour and 47 minutes daily, are adjacent to network programs. Because of TCI's black out, however, these ads were not carried on the cable system and were not seen by the Dubuque cable audience. Indeed, KCRG-TV's inability to reach the cable audience was cited by advertisers as a reason for buying time on KDUB-TV rather than on KCRG-TV." Source: Comments of Cedar Rapids Television, Inc. in MM Docket No. 88-138 at 6 (July 8, 1988); CR VOL. I.Z, EXH. 137, CR 15264.

619. The record indicated that: "If WSJT loses its current status of full carriage within its specified zone, as defined by the 'must carry' rules, I estimate an im-

mediate loss of 50 per cent of WSJT's advertising revenue. Such a loss would be a fatal blow to New Jersey's largest broadcast television service, and the only one serving the entire southern half of the state." Source: Comments of the National Association of Broadcasters, Appendix Volume, in MM Docket No. 88-138 at 3-4 (July 8, 1988) (Affidavit of Brian H. Eckert); CR VOL. I.Y, EXH. 128, CR 14703-04.

620. The record included the following information about station KWHB in Tulsa, Oklahoma: "Due to our lack of cable carriage by Tulsa Cable, our losses average $50,000 per month." Source: Comments of the National Association of Broadcasters, Appendix Volume, in MM Docket No. 88-138 at 1 (July 8, 1988) (Letter from Steve Morgan); CR VOL. I.Y, EXH. 128, CR 15023.

621. The record included the following information about station WAAP in Burlington, North Carolina: "The station is in financial straits largely because 11 cable systems consisting of 65% of the cable households in the market have refused to carry the station's signal." Source: Reply Comments of the Association of Independent Television Stations, Inc. in MM Docket No. 90-4 at 18 (Oct. 25, 1991); CR VOL. I.Q, EXH. 81, CR 11376.

622. The record included the following information about station WHCT: "Astroline estimates that it will lose over $2 million in advertising revenue in 1986 if WHCT is not carried on all local cable systems." Source: Joint Comments of Howard University, The National Association of Black-Owned Broadcasters, the National Bar Association and the National Conference of Black Lawyers Communications Task Force, in MM Docket No. 85-349 at 8 (Jan. 29, 1986); CR VOL. I.AA, EXH. 161, CR 15806.

623. The record included the following information about station WLIG: "WLIG predicts a loss of $1.6

million during its first year of operation. Losses are expected to continue as long as Long Island's cable systems continue to deny WLIG access to its potential audience." Source: Comments of WLIG in MM Docket No. 85-349 at 1 (Jan. 29, 1986); CR VOL. I.AA, EXH. 155, CR 15675.

2. *Evidence That Adverse Repositioning Of Local Broadcast Stations Causes Similar Injuries.*

624. The record indicated that: "The economic impact of favorable channel positioning is beyond question. TCI's most recent placement of its new service "Encore" demonstrates this fact: The Encore deal will also usher in shuffles in channel lineups across the board at TCI. In 95% of TCI systems, Encore will be put on channel 14, seen as a favorable channel slot because of its proximity to the VHF band." Source: "Hearings on Cable Television Regulation" at 881 (citing *Cable World*, April 22, 1991 at 4) (Statement of James B. Hedlund); CR VOL. IJ, EXH. 18, CR 97885.

625. The record included the following information:

"The devastation of channel shifting as an anti-competitive strategy can be seen in the audience loss that accompanies the repositioning. The following examples demonstrate the point. In each case, audiences in cable households declined after the station was repositioned. The decline cannot be attributed to programming because in each instance the audience share in non-cabled households increased.

WGNT, Portsmouth, VA; The station was shifted from channel 7 to channel 27. Its off-air audience increased by 4% while its cable audience declined 18%.

WPGH, Pittsburgh, PA; The station was shifted from a VHF to UHF position. its off-air audience in-

creased 7% while its cable audience declined 8%.

WPTY, Memphis, TN; The station was shifted from channel 12 to channel 24. Its off-air audience increased 29% while its cable audience declined 17% after the channel shift.

WTTE, Columbus, OH; The station was repositioned from channel 9 to channel 22. Its off-air audience increased 20% while its cable audience declined 6% after the shift.

KDVR, Denver, CO; The station was shifted from channel 10 to channel 31. Its off-air audience increased 27%, but its cable audience did not increase after the shift."

Source: "Hearings on Cable Television Regulation" at 881-82 (citing *Cable World*, April 22, 1991 at 4) (Statement of James B. Hedlund); CR VOL. I.J, EXH. 18, CR 07885-86.

626. The record included the following information: "Whenever a broadcast signal shift results in moving viewers to cable-only programming services, there is a greater incentive to increase channel repositioning. Most program suppliers would prefer to be located on channels 2-13, since cable systems usually carry the local network affiliates within that grouping. Many viewers select programs by 'grazing' through adjacent channels, and since the largest amount of viewing is still those network affiliates, most programmers believe they will reach the greatest audience by being located on those lower channels. In many ways, the effect is similar to a shopping mall, where large retailers help generate traffic for smaller retail outlets. In fact, some cable networks offer discounts or premiums to cable systems if they carry them on lower-numbered cable channels, or if they place their programming in between popular local broadcast channels." Source: "Hearings on Cable Television Regulation (Part 2)" at 106 (Statement of Thomas L. Goodgame); CR VOL. I.II, EXH. 16, CR 06273.

627. The record indicated: "Cable systems can favor some stations by transmitting them on-channel, while other stations can be shifted onto far less favorable channels, where subscribers are less likely to view them. By repositioning stations to less favorable channel positions and substituting cable networks on the more desirable channels, cable operators have the power to manipulate dramatically subscribers' viewing patterns. A.C. Neilsen studies are reported to show that viewership of cable networks can increase an average of 32 percent when cable networks are placed on cable channel 1 through 16." Source: "Hearings on Competitive Issues" at 528 (Statement of Gary Chapman); CR VOL. I.C, EXH. 8, CR 01867.

628. The record indicated that: "The fact lower-numbers cable channels are more significantly viewed was proven in Dallas shortly after a lineup change was effected. The system, formerly owned by Warner Amex Cable Communication Co. and equipped with Warner's two-way interactive Qube equipment, was monitored by MTV to see how its viewership changed with the lineup switch. Until mid-November last year, MTV was on channel 58 in Dallas; after the switch, MTV moved to channel 10, near the local ABC affiliate; no change in program package was made. According to Steve Seidman, MTV vice president, research, MTV's viewership increased by one-third in December and by the same amount in January in the Dallas system." Source: "Hearings on Competitive Issues" at 659-60 (*Multichannel News*, Sept. 8, 1986); CR VOL. I.C, EXH. 8, CR 01998-99.

629. The record also indicated that: "In September, 1986, KDVR was shifted from channel 10 to a channel 31 on the Cablevision and United Cable systems serving Denver and its suburbs. The cable systems' 220,439 subscribers represented 22% of the total television households in the market. As shown in Figure 5, KDVR's

audience in cable households showed no increase after the channel shift, while its audience in non-cable households increased by 27%. Moreover, although KDVR's audience rating in non-cable television households increased 27% after its signal had been repositioned, its total audience increased only 16%." Source: Appendices to Testimony of James B. Hedlund, President, Association of Independent Television Stations, Inc. Before the Subcommittee on Telecommunications & Finance, Committee on Energy & Commerce, U.S. House of Representatives at 3 (May 16, 1990) ("The Effect of Channel Shifting on Independent Audience Ratings," INTV); CR VOL. I.M, EXH. 24, CR 09280.

630. The following information was included in the record: "In 1987, WPGH was shifted from a VHF channel to a UHF channel on four cable systems serving Pittsburgh and other communities in its market. The cable systems' 131,484 subscribers represented 11% of the total television households in the market at that time. As shown in Figure 2, below, WPGH's audience in cable households declined eight per cent after the channel shift, while its audience in non-cable households increased by seven per cent." Source: Appendices to Testimony of James B. Hedlund, President, Association of Independent Television Stations, Inc. Before the Subcommittee on Telecommunications & Finance, Committee on Energy & Commerce, U.S. House of Representatives at 2 (May 16, 1990) ("The Effect of Channel Shifting on Independent Audience Ratings," INTV); CR VOL. I.M, EXH. 24, CR 09279.

631. The record indicated that: "In 1987, WPTY was shifted from channel 12 to a channel 24 on the Cablevision system serving Memphis, Tennessee. The cable systems' 130,000 subscribers represented 23% of the total television households in the market at that time. As shown in Figure 3, WPTY's audience in cable households declined 17% after the channel shift, while its

audience in non-cable households increased by 29%. Moreover, WPTY's audience rating in all television households declined 4% after its signal had been repositioned on its off-air channel." Source: Appendices to Testimony of James B. Hedlund, President, Association of Independent Television Stations, Inc. Before the Subcommittee on Telecommunications & Finance, Committee on Energy & Commerce, U.S. House of Representatives at 2-3 (May 16, 1990) ("The Effect of Channel Shifting on Independent Audience Ratings," INTV); CR VOL. I.M, EXH. 24, CR 09279-80.

632. The record indicated that: "In January, 1987, WTTE was shifted from channel 9 to a channel 22 on the Coaxial system serving Columbus, Ohio. The cable system's 62,214 subscribers represented 10% of the total television households in the market at that time. As shown in Figure 4, WTTE's audience in cable households declined six per cent after the channel shift, while its audience in non-cable households increased by 20%. Moreover, although WTTE's audience rating in non-cable television households increased 20% after its signal had been repositioned, its total audience showed no increase at all." Source: Appendices to Testimony of James B. Hedlund, President, Association of Independent Television Stations, Inc. Before the Subcommittee on Telecommunications & Finance, Committee on Energy & Commerce, U.S. House of Representatives at 3 (May 16, 1990) ("The Effect of Channel Shifting on Independent Audience Ratings," INTV); CR VOL. I.M, EXH. 24, CR 092780.

633. The following information was in the record: "In April 1987, WGNT was shifted from channel 7 to channel 27, its off-air channel, by the Cox Cable system serving Norfolk, Virginia Beach, and Portsmouth, Virginia. The cable system's 153,940 subscribers represented 29% of the total television households in the market at that time. As shown in Figure 1, WGNT's audience in

cable households declined 18% after the channel shift, while its audience in non-cable households increased by 4%. Moreover, WGNT's audience rating in all television households declined 10% after its signal had been repositioned on its off-air channel." Source: Appendices to Testimony of James B. Hedlund, President, Association of Independent Television Stations, Inc. Before the Subcommittee on Telecommunications & Finance, Committee on Energy & Commerce, U.S. House of Representatives at 2 (May 16, 1990) ("The Effect of Channel Shifting on Independent Audience Ratings," INTV); CR VOL. I.M, EXH. 24, CR 09279.

634. The record indicated that: "In 1988, Storer Cable decided to reposition WTOG, Channel, 44, St. Petersburg, from Channel 9 to Channel 25 on the cable system. Storer initiated the repositioning so they could carry distant signal WGN, Channel 9, Chicago, on channel. With the repositioning of WTOG to Channel 25, WTOG lost audience share within the Sarasota ADI. As a result of WTOG's loss of audience share, Arbitron abolished the Sarasota ADI and placed WWSB, the only Sarasota television station, within the larger Tampa-St. Petersburg ADI." Source: Statement of Douglas C. Barker, President, Southern Broadcast Corp. of Sarasota, Before the FCC, Orlando, FL, included in record in MM Docket No. 89-600 at 4 (March 2, 1990); CR VOL. I.R, EXH. 83, CR 11478.

635. The following information was in the record: "Moreover, even if NCTA were correct in considering remote controls as the solution to channel positioning problems, the fact remains that many subscribers do not have them. The comments of The 97 Television Stations and Chris-Craft describe the difficulties caused by cable systems repositioning broadcast stations to high channels since many television sets cannot receive these channels and the cable systems will provide, without additional charge, a converter for only one set, and that one without

a remote control." Source; Cable Television Regulation (Part 2): Attachments to NAB Testimony in Hearings Before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce, 101st Cong., 2d Sess. at 27 (May 16, 1990); CR VOL. I.L, EXH. 22, CR 08878.

636. The record indicated that: "A.C. Nielsen studies show that viewership on cable networks can increase an average of 32% when a cable network is placed on cable channels 1 through 16. Therefore, repositioning broadcast stations to less favorable channel positions and substituting cable networks on these more desirable channels can have significant benefits for cable operators. Vertically integrated cable operators reap the benefit of increased viewership, and therefore increased advertising revenues for its upstream affiliate. Those operators which are not vertically integrated also benefit competitively by repositioning: their competitor for local advertising dollars will be watched by fewer viewers while revenues from local spot advertising for the cable system's own programming is increased." Source: Cable Television Regulation (Part 2): Attachments to NAB Testimony in Hearings Before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce, 101st Cong., 2d Sess. (May 16, 1990) ("First Amendment Analysis of a Must Carry Statute," by P. Cameron Devore) (Appendix I); CR VOL. I.L, EXH. 22, CR 08831.

637. The record indicated that: "The costs of obtaining the equipment needed to access higher channels can be high. One cable ssytem reportedly charges subscribers four dollars *per month* for a simple remote control which costs the system only seven dollars to make. *Why Many Viewers Would Like to Zap Their Cable Companies*, 'Wall St. J., March 19, 1990, at B4, col. 5.'" Source: Cable Television Regulation (Part 2): Attachments to NAB Testimony in Hearings Before the Subcommittee on

Telecommunications and Finance of the Committee on Energy and Commerce, 101st Cong., 2d Sess. at 27 n.28 (May 16, 1990) (NAB Reply Comments to the FCC); CR VOL. I.L, EXH. 22, CR 08878.

638. The record included the following information about WOFL: "Most importantly, preliminary Nielsen data ordered by WOFL shows significant ratings declines among cable subscribers in the systems identified above [where WOFL was repositioned], on the order of 16% as compared to other area cable homes where WOFL was not moved, with an estimated loss of $300,000 in revenues on a yearly basis." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 21 (Sept. 25, 1991) ("Free Television Under Siege," INTV (May 1988); CR VOL. I.K, EXH. 21, CR 08575.

639. The following information was in the record: "Local stations are just beginning to receive audience measurement data which demonstrates the severe harm caused by these channel shifts. For example, station WOFL Orlando, FL was shifted out of the VFH band on three local systems owned by TCI that serve a total of 45,000 subscribers. WTBS-TV, a distant signal from Atlanta that is partially owned by TCI, was retained in the VHF band. WOFL and WTBS both broadcast children's programming (indeed many of the same programs) from 7-9AM on weekday mornings. In November 1986, prior to the channel shifts, WOFL earned a 15 percent share of audience and WTBS earned a 1 percent share of audience from 7-9AM weekdays in the areas served by these three TCI systems. In November of 1987, 11 months after the channel shift, the relative positions of WOFL and WTBS were almost exactly reversed. WTBS rose to a 16 share while WOFL fell to a 2 share. This dramatic rating shift was attributable specifically to TCI's channel shift since the relative audience positions of the two stations remained stable over the same period in the

rest of the Orlando market." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 3-4 (Sept. 25, 1991) ("Free Television Under Siege," INTV (May 1988); CR VOL. I.K, EXH. 21, CR 08547-48.

640. The record included the following information about WOFL:

> "This past summer, the Orlando-Daytona Beach market's oldest and highest-rated Independent station discovered that the TCI-owned cable systems in Daytona Beach (30,000 subscribers), Titusville (12,000 subscribers) and Barefoot Bay (3,000 subscribers) had removed WOFL from its long-held position in the first twelve channels. In every case, TCI replaced WOFL with a cable service in which it held an equity interest. In addition, cable systems in Cocoa-Beach (11,000 subscribers) and Lake County (25,000 subscribers) also pushed WOFL from the lower dial to a channel position above #14.
>
> WOFL lost access to virtually all the hotel/resort rooms in this tourist-dependent region. In areas like this, many local businesses actively seek tourists' business by advertising on television stations which are viewable in the hotels, and has suffered significant problems as a result.
>
> Most importantly, preliminary Nielsen data ordered by WOFL shows significant ratings declines among cable subscribers in the systems identified above, on the order or 16% as compared to other area cable homes where WOFL was not moved, with an estimated loss of $300,000 in revenues on a yearly basis."

Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 21 (Sept. 25, 1991) ("Free Television Under Siege," INTV (May 1988); CR VOL. I.K, EXH. 21, CR 08575.

641. The record indicated that: "Local stations shifted to a channel position higher than 13 cannot be received *at all* on many television receivers. Non-'cable ready' sets that are connected to a cable without a converter box receive via cable only those stations and program services carried on channels 2-13. These conditions frequently exist in apartment buildings, hotels and on second and third sets in private homes (recreation rooms, bedrooms, etc.). Being shifted up is the equivalent of being removed from the system with respect to these television sets." Source: "Hearings on Competitive Problems" at 352 n.3 (Statement of Preston R. Padden); CR VOL. I.H, EXH. 14, CR 05285.

642. The record indicated that: "Most program suppliers would prefer to be located on one of these channels since cable systems usually carry the local network affiliates within this channel group (channels 2 through 13). Since most viewers select programs by flipping among adjacent channels, and since the largest amount of viewing is still focused on programming provided by local network affiliates (see Table 2), most broadcast and cable programmers believe that they will achieve higher audience levels by being located on these lower channels. [Among national cable programmers, ESPN and MTV have been the most aggressive with respect to giving cable operators monetary incentives for placement on low-band channels (channels 2 through 13)]." Source: "Hearings on Competitive Problems" at 352 n.3 (Statement of Edward O. Fritts); CR VOL. I.T, EXH. 14, CR 05262.

3. *Evidence That The Ability Of Broadcast Stations To Obtain Financing Is Jeopardized By The Absence Of Assured Cable Carriage.*

643. The following information was in the record: "New stations cannot get any financing today, Senator. None whatsoever. You cannot get any existing working

capital, nor can people build new stations that they have been construction permits from the FCC because of this must-carry problem. Many stations that are on are terrorized by the possibility of being taken off. I have talked to them all the way from Riverside to Lowell, MA, to Florida. New stations are held in bondage by cable today. Cable's goal is to sell $5 billion in advertising by early 1990's. It is pretty obvious why they do not want us new boys on the street." Source: "Hearings on Competitive Issues" at 691 (Statement of Wendell Triplett); CR VOL. I.C, EXH. 8, CR 02030.

644. The record included the following: "Absent assured cable carriage in cable markets, would-be new stations are caught in a vicious financial vise. On the average, to put a new television station on the air now costs between $3 million and $4 million, according to Thomas J. Buono, President, Broadcast Investment Analysis, Chantilly, Virginia. Attracting and retaining investment capital of this magnitude is difficult or impossible if there is the possibility that the new station, once operational, will be hobbled during its start-up period by the inability to ever begin to compete for the attention of the cable portion of its potential audience. The start-up period is critical: typically, new stations will achieve better than half their revenue share potential in their first full year of operation. Demonstrable effects are already in evidence: new station applications to the FCC are down by about 80 percent over one year ago, after several years of steadily increasing numbers of applications. No explanation is apparent other than the loss of assured carriage; there is not, for example, any significant reduction in available channels, and except for the threat noted by the carriage problem, new stations are generally considered an attractive investment." Source: Comments of the National Association of Broadcasters in MM Docket No. 85-349 at 36-37 (Jan. 29, 1986); CR VOL. I.BB, EXH. 165, CR 16194-95.